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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
1 2879 F
OF
THE STATE OF MISSOURI.

BY CHAS. C. WHITTELSEY,

REPORTER.

VOL. VI.

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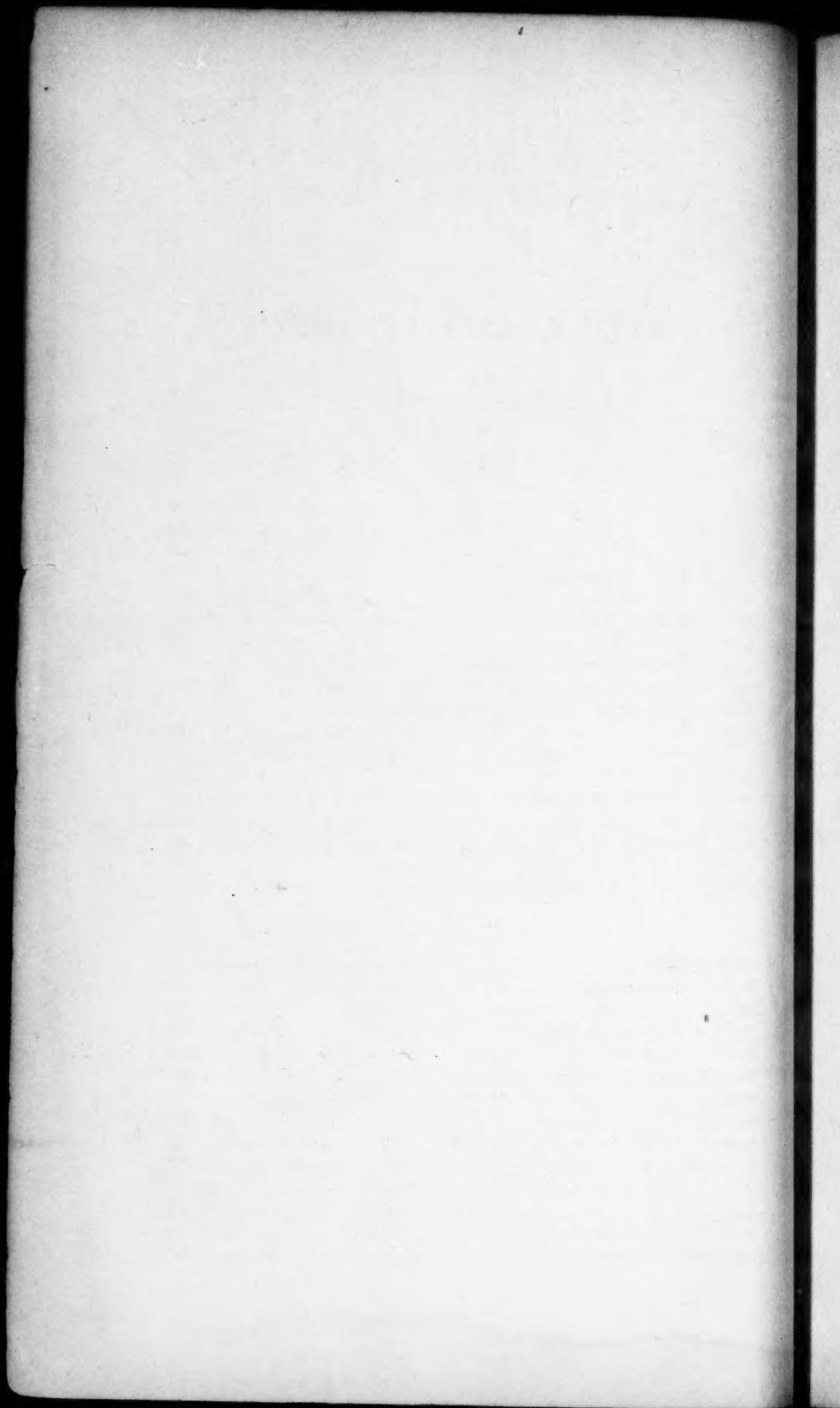
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} *Judges.*



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CASES
ARGUED AND DETERMINED
Bruère v. Helzge
THE SUPREME COURT

OF
THE STATE OF MISSOURI,

OCTOBER TERM, 1865; AT ST. LOUIS.

[CONTINUED FROM VOL. XXXVI.]

VALENTINE BECKER, Respondent, *v.* THE CITY OF ST. CHARLES
AND GEORGE H. SENDEN, CITY MARSHAL, Appellants.

1. *Highways — Dedication — Estoppel.*— To constitute a dedication of private property to public use, at common law, there must be, 1st, a plain and unequivocal intention on the part of the owner to appropriate the property for public use, and, 2d, there must be an acceptance by user or otherwise on the part of the public. In a dedication under the statute, by making and filing a plat, no acceptance by the public need be shown. Although as against his grantees the owner of land may be estopped from denying the fact of dedication, where he has granted lands calling for a street or a highway as a boundary, yet as against the public neither he nor his grantees are estopped until acceptance and user be shown.

Appeal from St. Charles Circuit Court.

Theodore Bruère, for appellants.

I. Dick, conveying at a time when he was the owner of the whole of lot 18, Boone's survey, through which Eighth street, when established, had to be located, by a deed of trust to King, trustee, that part of said lot 18 lying west of

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Eighth street, hereafter to be opened, and bounding the land so conveyed on the east by Eighth street, so mentioned, thereby reserved and dedicated the land required for Eighth street to the public in the event of sale under said deed of trust; and said sale having actually taken place, the dedication thereby became absolute and final.

II. Becker giving by said deed said trustee power to sell said real estate, or so much thereof as should be necessary, together with its appurtenances, and to convey said real estate and appurtenances in pursuance of said sale, thereby bound the trustee to sell and convey the land according to the description contained in said deed, with the right to said Eighth street; and any deeds made under said deed of trust and sale, by King, contain as much a dedication of said street to the public as if made by Dick himself.

III. Even without any formal deeds or acts done by Dick, his first deed to Valentine Becker bounding the land therein conveyed by Eighth street, as laid out according to a plat filed by Andrew King, trustee, in the recorder's office of St. Charles county, May 31, 1860, amounts to a dedication of said street to the public, and any subsequent deeds of Isaac Dick cannot divest the public of the right thus acquired.—(Washb. Eas., 145, § 26, & 138, § 17; 3 Kent, 604, & 574, n., new ed.; 2 Smith's L. C., 180; Ang. on High., § 149; 2 Wend. 475; Matter of 32d street, 19 Wend. 130; 8 Mo. 457; Missouri Inst. v. How, 27 Mo. 216; McKee v. City of St. Louis, 17 Mo. 191; Godfrey v. City of Alton, 12 Ill. 29-35.)

IV. The proper authority to take charge of what has thus been actually dedicated is the local corporate body within which the same is situate; here, the City of St. Charles. (Washb. Eas., p. 156.)

V. V. Becker is, under his deeds from Dick and Walters, estopped from denying against the City of St. Charles the recitals contained in said deeds. If these deeds contain a dedication, the City of St. Charles being the grantee under said dedication is to be considered a party thereto in law.

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VI. All acts *in pais* done by Dick, or by his authority, with the intention to dedicate Eighth street to the public use, are binding upon him and those claiming under him. The acts of Dick in making out, at the sale made by A. King, a plat on which he laid out Eighth street fifty feet wide; in laying out lots on said street, and as a part of an addition to the City of St. Charles; in having the property thus sold by the trustee, at his special request, in his presence, and without any objections on his part; in executing, after said sale, a number of conveyances, in which he refers to the plat according to which said trustee sold, and specially to Eighth street as laid out thereon; in having, after said sale, the trees cut down in order to clear the street,—are explicit manifestations of his intention to make such dedication. (Ang. on Highw., § 142; Washb. Eas., p. 139, § 19.)

VII. Though ordinarily there is no other mode of showing an acceptance by the public of a dedication of a street than by the public using it, such acceptance may be shown by any acts done by the City of St. Charles to signify the same. In this case it was the notice given to Dick and Walters to open the street long before V. Becker became the owner of their property, and a resolution of the city council to that effect. (Washb. Eas., p. 139, § 21, & p. 145, § 26; 19 Wend. 130.) 26 Barb. 634, by any official act of the corporation a sufficient acceptance can be made. State v. Carver, 5 Strobh., cited by respondent, expressly states that if the town council signify this acceptance by any acts, without even the use of the public, that is sufficient.

E. A. Lewis, for respondent.

I. Even if any or all the circumstances relied upon could be regarded as dedicatory acts, yet, as there was no evidence of any acceptance on the part of the city or the public, by user or otherwise, there could not be a complete dedication. (Washb. Eas. 141-2, 148-9, 151, 153; 2 Greenl. Ev. § 662; State v. Carver, 5 Strobh. 217; Livandais v. Municipality, 16 La. 509; David v. Municipality, 14 La. An. 872; People

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v. Beaubien, 2 Doug., Mich. 256; Bissell v. R.R. Co., 26 Barb. 634.)

II. No act or declaration of Dick prior to the trustee's sale amounted to more than the expression of an intention thereafter to dedicate Eighth street; and such declarations of intention are held not to constitute sufficient evidence of a dedication. (Washb. Eas. 133-4, 136.)

III. The attempt of the trustee to dedicate Eighth street was a mere nullity; for, 1st, that portion of the ground never was conveyed to, or vested in him, at all—the deed of trust describing the property conveyed as "lying *west* of Eighth street, to be hereafter opened"; 2d, his attempt was made more than ten days after the sale and satisfaction of the trust, and the extinguishment of all his power over the land as trustee or otherwise. (Washb. Eas., p. 132, § 11; Ward v. Davis, 3 Sandf. Sup. Ct. 502.)

IV. Any right of highway arising from the sale by plat, or from deeds executed by Dick or the trustee, could only be claimed by the grantees themselves, or persons claiming under them, or by some one who, upon the faith of the recitals or descriptions in such deeds, had acquired a vested interest in the street, which it would be a fraud upon him to destroy; and as the city does not appear to have occupied either of these positions, it can set up no such claim in the premises. (Washb. Eas. 142-4, 147; Badeau v. Mead, 14 Barb. 328.) Washb. Eas., p. 45, § 26, refers to Barclay v. Howell, 6 Pet. 498, which on examination will be found inapplicable to a case like the present. The other cases are those where the streets had been laid off by public and duly authorized officers.

V. As the city was not a party to any of the deeds referred to, it cannot set up any estoppel as arising from them. (Cottle v. Snyder, 10 Mo. 763; Jackson v. Woodruff, 1 Cow. 276; Betts v. New Hartford, 25 Conn. 180.)

LOVELACE, Judge, delivered the opinion of the court.

This action was commenced for the purpose of obtaining an

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injunction against the defendants' opening a street through the plaintiff's enclosure. The temporary injunction was granted in the vacation of the Circuit Court of St. Charles county, and, at the regular term of the court after the defendants had answered and moved to dissolve, the injunction was made perpetual; to reverse which, the case is brought here by appeal.

The evidence shows that the whole property was originally owned by one Isaac A. Dick, who, in 1857, conveyed to Andrew King, as trustee to secure the payment of a debt due Samuel B. Smith, all that portion "lying west of Eighth street, to be hereafter opened." On the 19th day of May, 1863, the trustee sold a portion of the land thus conveyed to satisfy the trust. Prior to this sale, Dick had the land marked off into lots, and the street in question was laid down on the plat of the land thus marked off and called "Eighth street." On the day of sale, Dick handed this plat to King, the trustee, and requested to have the land sold in accordance with the same, which the trustee accordingly did. After the sale, Dick refused to acknowledge and file the plat, as required by statutes; but King, the trustee, did acknowledge and file the same on the 3d day of May, 1863. It also appeared that Dick had made several other deeds to other persons calling for Eighth street as a boundary. It was not contended, nor did the evidence show, that the street had ever been opened or used by the city.

Upon these facts, the city claimed that the land covered by the proposed Eighth street was dedicated to the public, and were taking measures to have the same opened when the plaintiff interposed his injunction.

It is not contended that the plat filed by King amounts to a dedication, under the statutes, of the streets and alleys marked on said plat, the plat not having been filed in accordance with the statutes; but it is contended that the acts of Dick in making the plat, in having the land sold in accordance with the plat, and in calling for Eighth street as a boundary in other deeds made by him, constituted a dedica-

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tion at common law. Two things are necessary to constitute a dedication at common law of private property to public use: first, there must be a plain and unequivocal intention on the part of the owner to appropriate the property for public use; and secondly, there must be an acceptance, by user or otherwise, on the part of the public. The doctrine, says Judge Scott (*Rector v. Hartt*, 8 Mo. 448), seems well settled in America, that an owner of land may without deed or writing dedicate it to public uses. No particular form or ceremony is necessary in the dedication; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. So it has been held that when the owner of land in a city sells the land as building lots, bounding them by streets of a specified width, as laid down on a map, but not actually opened, the purchasers acquire a legal right as against the grantor to have the streets opened to the width delineated in the map, and the land thus included in the street will be dedicated to public use. (*Matter of Lewis st.*, 2 Wend. 475; *Matter of 13th st.*, 19 Wend. 130.)

In this case, it would seem that the intention of Dick to appropriate the land in question for a street is sufficiently manifest to enable the purchasers to have it opened according to the rule laid down in the cases above cited; but can the City of St. Charles, against the will of these purchasers, have the street opened? The city was no party to any of the deeds made by Dick, in which he calls for this street as a boundary. The street was never opened and consequently never used by the public. If the intention to dedicate to the public be sufficiently manifest, still there is not a solitary act on the part of the public indicating an acceptance. In a dedication under the statute no acceptance on the part of the public need be proved, because the dedication itself vests in the public the fee to the property; but in the mere dedication of an easement in property an acceptance ought to be proven, for however clear may be the owner's intention to dedicate, still, if the public fail to accept and use the property

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for the purposes for which it was appropriated, no title will pass. It is only the easement or right to use the property, in a manner expressed or implied in the act of dedication, that is intended to be given to the public, the owner retaining the fee in himself; and whenever that use is relinquished or lost, the owner again becomes revested with as absolute and exclusive dominion over the property as he possessed previous to the dedication. (Ang. on Highw., § 132.) We think there was no sufficient acceptance to vest the property in the City of St. Charles.

But it is contended that Dick and the plaintiffs claiming under him are estopped from denying the dedication and acceptance by virtue of the various deeds made by Dick calling for Eighth street as a boundary. It is not contended that there is an estoppel in the ordinary sense that a party is estopped from denying what he has solemnly disclosed to be the fact by deed; but it is claimed that this is an *estoppel in pais*. The doctrine of *estoppel in pais*, so far as it is applicable to real estate, vests upon the equitable principle that the owner of land who induces or suffers another to acquire an interest in, or expend money upon, such land under an erroneously supposed right so to do, shall thereby be precluded from denying the existence of such supposed right. (Ang. on Highw., § 156.)

And this doctrine, applied to streets or highways, would simply mean, that where an owner of land had sold the land as bounded by a street, he would be estopped as against the purchasers from denying the existence of the street.

"But the public," says the authority above referred to, "acquires its right by the acceptance of a voluntary donation, and holds it against the owner, not because he is precluded by any equitable principle from asserting his title, but because he has no title which is not consistent with the public use. If this plaintiff was seeking to have this street opened as against Dick, it would seem that Dick would be estopped from denying that Eighth street was a public street, because he might justly say that it was upon the faith of

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Dick's representations that Eighth street was a public street that he purchased the property ; but this defenee, which the law provides for his benefit and to protect his rights, ought not to be set up to prejudice them.

The judgment is affirmed. The other judges concur.

WILLIAM H. SMITH *et als.*, Appellants, *v.* RAPHAEL DENNY *et als.*, Respondents.

1. *Administration—Personalty.*—The title to personal property, upon the death of the owner, passes to the administrator or executor, and he only can sue for the property or for an injury thereto.

Appeal from St. Charles Circuit Court.

The petition was as follows :

“William H. Smith and F. Leona Smith, by John M. Keithly, their guardian ; Woodford Keithly and Mary M. Keithly, his wife, plaintiffs, *v.* Raphael Denny, Lawrence Fisher, Raphael Denny, executor of Rachel Denny, Raphael Denny, and Martina Denny, administrators of John Denny, defendants.—In the Circuit Court of St. Charles county, May term, 1865.

“Plaintiffs by leave of court file their amended petition, and state that Rachel Denny, on the — day of November, 1842, by deed of that date, which deed is not in possession or under the control of plaintiffs—a copy of which is herewith filed—conveyed to John Denny as trustee for Mary Smith, the wife of John Adam Smith, two certain slaves named George and Sarah, in which deed it was stipulated that said Mary Smith should have the actual use, management and control of said slaves so long as she should live, and at her death said slaves should descend to the children of the said Mary Smith, to be their absolute property.

“Plaintiffs say that, at the date of said deed, the said Mary Smith was the wife of John Adam Smith ; that the said Mary

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Smith died in the year 1845, and said J. Adam Smith died in the year 1851, they leaving one child born of their marriage surviving them, named Rachel Ann Smith; that at the death of the said Mary Smith said slaves descended to and became the absolute property of the said Rachel Ann Smith, who was her only child.

" Plaintiffs further state that the said Rachel Ann Smith departed this life in the year 1853, being yet a minor, unmarried, and without issue, leaving as her only heirs John Smith, William H. Smith, Mary Smith (now wife of Woodford Keithly), and Frances Leona Smith, her brothers and sisters of the half-blood by marriage of her father, the said John Adam Smith, prior and subsequent to his marriage with the said Mary, the mother of the said Rachel Ann Smith;—that no administration letters were ever granted, nor was there any administration on the estate of said Rachel Ann Smith; that, after the death of said Rachel Ann Smith, one of her half-brothers, the said John Smith, died, being yet a minor, unmarried, and without issue, leaving the plaintiffs his only heirs, and no letters of administration were ever granted, nor has there been any administration of his estate, and his death occurred at least three years before the commencement of this suit; that John M. Keithly was duly appointed and qualified as guardian of said William H. and F. Leona Smith on the 14th day of July, 1856, and is still acting as guardian of them. By reason of all which, the said plaintiffs and the said John Smith, now deceased, became the owners of, and were entitled to, the possession of said slaves, as the heirs of Rachel Ann Smith at her death.

" Plaintiffs further say that, after the death of the said Rachel Ann Smith, Sarah, one of the said slaves, came into possession of defendants Raphael Denny, Lawrence Fisher, John Denny (now deceased), and Rachel Denny (now deceased), who wrongfully converted said slave to their own use, and sold her to one E. C. Stewart, on the 1st day of January, 1857, for the price of one thousand and thirty dollars, and received said sum of money from said Stewart and converted

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and applied the same to their use, and said slave was removed beyond the jurisdiction of this court and to parts unknown to plaintiffs ; that since said sale and conversion the said Rachel Denny hath departed this life, and said Raphael Denny is her executor, duly qualified and acting ; that said John Denny has also died since said sale and conversion, and Raphael and Martina Denny are his administrators and have charge of his estate.

" Plaintiffs therefore say that, by reason of the premises, they are entitled to have and recover of defendants the value of said slave Sarah as aforesaid, and defendants became liable to pay the same at the time of her conversion, which said slave on the first day of January, 1857, was of the value of one thousand and thirty dollars ; for which amount, with interest since January 1, 1857, plaintiffs ask judgment."

Wm. A. Alexander, for appellants.

The deed from Rachel Denny to John Denny, trustee for Mary Smith and her children, being of record, imparted notice of the title to said slave to the world, and two of the defendants were parties thereto, and all of them had actual knowledge thereof when they petitioned the county court for the sale of said slave, were trespassers in selling said slave, and each of them became liable for the whole amount of the damages caused by their tort. (Hill. Torts, 244-48, § 3-4.) There was no final settlement made of John Denny's guardianship, and the papers and his settlement show that he never accounted for said sale money. The partition papers and order of sale, introduced by defendants, show that John Denny did not sell said slave as guardian ; but they do show that the defendants, ignoring the deed from Rachel Denny to John Denny, trustee, sold said slave as their own, and converted the money to their own use. (Neff v. Hunter, 30 Mo. 332; 8 Wend. 613; 2 Hill. Torts, 244-49, § 3-4; Canifax v. Chapman & W., 7 Mo. 175; 12 Wend. 39.)

No demand was necessary. (R. C. 1855, p. 448, § 34.) Demand never is necessary in case of conversion ; and in

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cases where demand is necessary, it must be set up in the answer, and money or property (sued for) tendered. (Westcott v. Demontreville, 30 Mo. 252.)

Bruère, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The petition in this case shows no cause of action. The deed from Rachel Denny to John Denny vested the title to the slaves in the latter, in trust for Mary Smith during her natural life. Should she die before her husband, then he was to have the use and control of them whilst he lived; remainder then to vest absolutely in the issue of the said Mary, if any survived her; but if she died no issue surviving, then they were to revert to the donor.

Rachel Ann Smith was the only issue born of the marriage of John Adam Smith and Mary Denny, and she survived them both, and by the terms of the deed of trust the title to the slaves then vested in her absolutely. And when John Denny was appointed by the county court of St. Charles county guardian of the person and curator of the estate of Rachel Ann, he was in possession of the slaves by virtue of his appointment as such curator, and not under the title vested in him by the deed of trust.

Upon the death of the said Rachel Ann, the property being personal property belonged to her administrators and not the heirs. The appellants, who claim to be the heirs, are proceeding as if it were real estate; but, being purely personal in its nature, there must be an administrator to represent it before an adjudication can be had in court. Personal property must be administered on before the heirs can claim their distribution shares.

The petition and sale on partition were irregular, and evidently proceeded on the belief that on the death of Rachel Ann Smith the slaves reverted back to respondents or their intestates; but the absolute legal title being vested in her, they went to her administrator.

The record shows clearly that the guardian, John Denny,

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whose settlement is now sought to be set up as a bar, never charged himself with the slaves, nor accounted for them; but, by joining with the other parties in the petition for partition, and also in the bill of sale, he disclaimed all title in his ward, and asserted it in himself and associates.

The appellants showing no cause of action in this proceeding, the judgment is affirmed. The other judges concur.

WILLIAM E. HENDRICKS, Appellant, *v.* JOSEPH EBBITT, Respondent.

1. *Witness—Evidence.*—The assignor of a note or chose in action is not a competent witness as to any facts occurring prior to the assignment.

Appeal from St. Louis Circuit Court.

Hill & Jewett, for appellant.

Lackland, Cline & Jamison, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought by plaintiff against defendant on an assigned note. On the trial, the defendant introduced the deposition of the assignor in regard to facts in connection with the note which took place anterior to the assignment. The plaintiff objected to the testimony as incompetent, and the court, sitting as a jury, took the deposition with the declaration that it would exclude such parts as were objectionable; but the record shows affirmatively that no part of the deposition was excluded.

By our law, the assignor of an account, judgment, or thing in action, is incompetent to testify concerning any facts occurring anterior to the assignment. (2 R. C. 1855, p. 1577, § 6.)

That part of the deposition which spoke of facts concerning the transaction occurring prior to the assignment should have been excluded; but as the records shows it was not, the judgment will be reversed and the cause remanded.

Judge Holmes concurs; Judge Lovelace absent.

Greenleaf et als. v. St. Louis Ins. Co.

DAVID N. GREENLEAF, DUNCAN S. CARTER, AND WILLIAM P. WILCOX, Appellants, *v.* THE ST. LOUIS INSURANCE COMPANY, Respondent.

1. *Insurance—Policy—Deviation—Warranty.*—A time policy was issued upon a steamboat, which excepted the navigation of certain waters. After the issue of the policy, the boat made a trip upon the forbidden waters, and returned safely to port, and while in port was subsequently destroyed by fire. *Held*, that by the terms of the policy the insurance of the boat, while navigating the permitted waters, did not constitute a warranty, but only an exception to the perils insured against, and that the insurers were liable upon their policy.

Appeal from the St. Louis Circuit Court.

T. T. Gantt and J. H. Rankin, for appellants.

In 1839 a policy of a similar character came before Mr. Justice Story, and was construed by him in the case of *Palmer v. Warren Ins. Co.*, 1 Stor. 360 et seq. * * * The appositeness of the remarks of Mr. Justice Story in the case of *Palmer v. Warren Ins. Co.*, and the authority of the Supreme Court of the United States in the case of *Yeaton v. Fry*, 5 Cranch, 335, render it unnecessary to say anything. It is submitted, that

I. The exception of the Missouri, Red, White, Arkansas and Yazoo rivers in the policy does not amount to a warranty, or a condition that the A. McDowell should not, during the time covered by that instrument, enter any of these rivers; but,

II. That exception did have the effect of suspending the liability of the underwriters during any navigation of those rivers, and of exempting them from any liability for loss or damage consequent upon such navigation.

III. That the loss stated in the petition having been in no respect caused or contributed to by the trip to Kansas, the underwriters are liable therefor.

Glover & Shepley, for respondent.

I. The voyage up the Missouri river being on waters not

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covered by the policy, and a voyage not provided for therein, is a deviation and the insurers are discharged.

1. To constitute a deviation it is not necessary that there should be an increase of risk. The risk may be actually less than that permitted by the policy. It is enough that it is not the risk insured. The insured has no right to substitute other risks, and a deviation instantly results the moment another and different risk is taken from the one insured. (2 Par. Mar. Law, 276; Kelsell v. Wiggins, 13 Mass. 68; 2 Par. Mar. Law, 283; Ellcott v. Mason, 4 Bro. P. C. 469.)

2. Any deviation, however slight, or for however short a time it may exist, discharges the insurer. (Coffin v. Newburyport, 9 Mass. 436-39; Walsh v. Homer, 10 Mo. 6.; Natchez Ins. Co. v. St. bt., 2 Sm. & M. 340; Gazzam v. Ohio Ins. Co., Wright, 204; Jolly's Ex'rs v. Ohio Ins. Co., Wright, 540.)

3. The fact that this is a time policy in no manner affects this case, as the waters in which the vessel was to run during the risk insured were specified in the policy, and there could be no departure from these without it being a deviation.

4. But in fact this is no time policy. A time policy is when the insurance extends from one time named to another time named, on a vessel, without confining her, or naming any particular ports or seas in which the vessel shall run. These are called mixed policies, illustrations of which will be found in 1 Arn. on Ins., 412-15.

5. The plaintiffs voluntarily took the chances as to what effect this would have upon their insurance when they declined to insure for the voyage, and took the risk themselves, and did not obtain any permission from the defendant. Therefore, they voluntarily incurred, with full knowledge, all the consequences of the act.

II. The words used in the policy are a warranty on the part of the insured that during the period for which the boat was insured she would not go into the Missouri river. So that here is not only a deviation, but the same act is a breach

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of a warranty on the part of the insured. The elements and effects of a warranty in a policy are these:

- a. It must appear on the face of the policy itself.
- b. It must relate to the risk.
- c. It is immaterial whether a loss can be traced to the breach of the warranty or not. (1 Arn. Ins., 581.)
- d. A warranty is part of the contract, and must be performed whether material or immaterial. (1 Arn. Ins., 584; Gaty v. Phoenix Ins. Co., 30 Mo. 56.)

1. The clause in the policy is a warranty on the part of the insured that the boat will not, during the continuance of the policy, run in the Missouri or other excepted waters.

A warranty is an expression or stipulation inserted in a contract of insurance, (Wall v. East River Ins. Co., 3 Seld. 370; 6 Wend. 488; Wright, 202 & 539; 1 Arn. on Ins. 577, 579 & 581; 2 Par. Mar. Law, 106-31; 30 Penn. 315; 6 Gray, 221; Ogden v. Ash, 1 Dall. 162,) and it makes no difference though it was known to the insurer that the warranty was false at the time the insurance was made. (30 Penn. 315.)

A breach of warranty touching a future fact avoids the policy. (1 Arn. on Ins. 583.) Thus an insurance of "the American ship M.," the "Spanish brig M. C.," the "Swedish brig S.," is a warranty that the vessel is as stated. (1 Phil. on Ins., 416.)

WAGNER, Judge, delivered the opinion of the court.

This was an action on a policy of insurance for five thousand dollars effected in the St. Louis Insurance Company on the hull of the steamer A. McDowell.

The insurance was for one year beginning on the 4th day of April, 1862, and ending on the 4th day of April, 1863. The policy contained the following clause: "With permission to navigate the Mississippi and Ohio rivers and their tributaries, usually navigated by boats of her class, the Missouri, Arkansas, White, Red, and Yazoo rivers excepted."

At the trial the following facts were agreed upon by both parties :

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1. That the policy described in the petition was executed by the insurance company.
2. That on the 24th of May, 1862, the McDowell left St. Louis on a voyage to Leavenworth, Kansas, and returned to St. Louis on the 1st day of June, 1862.
3. That said voyage was undertaken entirely for the United States Government, the vessel having no freight except 300 soldiers and 200 mules and horses.
4. That full notice of her arrival and departure on this trip was given by advertisement in the Daily Missouri Republican, a paper taken daily by defendant.
5. That no damage was done to said vessel, by said voyage, and that she returned in a good and seaworthy condition to the port of St. Louis.
6. That no other act of the plaintiffs, except said voyage, is set up by the defendant to defeat this action.
7. That before the McDowell went into the Missouri river on said voyage the owners had a consultation about the expediency of obtaining insurance on said vessel, in the Missouri river, during said voyage, but they finally concluded to take the risk themselves for that voyage. It is insisted in support of the judgment of the court below, that the policy contained a warranty that the vessel should navigate none of the excepted streams; and also that in going into the Missouri river the boat had been guilty of a deviation.

If either of these positions be true, it is fatal to the appellants. Every affirmation of a fact contained in a policy, in whatever terms expressed, will be construed as a warranty. (2 Duer on Ins., 644.) Designating a ship as of a certain nationality; describing her as containing a certain armament, or as being fitted out in a particular manner, will amount to a warranty that the vessel is of the national character ascribed to her, and that she has the armament or outfit described, and whether these matters are material or immaterial as regards the risk will make no difference. The first question to be determined in interpreting the clause in the policy is to ascertain the true intention of the parties to /

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the instrument; and here it is to be considered that the provision or exception being in writing, and being the especial words of the insurers, if there is any ambiguity or uncertainty, the construction must be most strongly against or unfavorable to them. (2 Par. on Marit. Law, 55.) From a careful perusal and examination of the exception, we are of opinion that it does not constitute a warranty.

This was a time policy, and a policy *on time* insures no specific voyage, but covers any voyage within the prescribed time. It is of the nature of a policy on time that it limits the vessel to no geographical track, and deviation is therefore not predicable of it. (Bradlie v. Md. Ins. Co., 12 Pet. 378; Union Ins. Co. v. Tyson, 3 Hill, 118; Keeler v. Fireman's Ins. Co., 3 Hill, 250.)

In Yeaton v. Fry (5 Cranch, 335) the policy of insurance was for a specific sum on the brig Richard, "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk," and the insurance was declared to be made against all risks, blockaded ports and Hispaniola excepted." The vessel sailed from Tobago to a blockaded port, but without a knowledge of the blockade, and was turned away, and afterwards on her voyage back to Norfolk was captured by a French privateer. Chief Justice Marshall delivered the opinion of the court, and held that the words "all blockaded ports," &c., could not be construed as a warranty on the part of the insured, but were the words of the insurers and must be considered as an exception from the general risks of the policy.

In a policy of insurance on time containing the following clause, "excluding, during the term, all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1839, each at noon"—and the vessel sailed from New York for, and arrived at St. Iago de Cuba, within the excluded period, and was lost on her return in December following—it was decided that the underwriters were liable, the loss not happening within the excepted period, and the clause in the policy not being an exception or exclusion of

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voyages, but only a suspension of the risk during such time as the vessel should be at the excepted ports. (*Palmer v. Warren Ins. Co.*, 1 Sto. 360.)

Now, the *McDowell* made her trip in the Missouri river in the latter part of May, and was destroyed by fire in the subsequent October. It is admitted that while prosecuting her voyage in the Missouri river she received no damage or injury whatever that in anywise conduced to her destruction. The permission in the clause is to navigate the Mississippi and Ohio rivers and their tributaries, excepting the Missouri and others, during the term of one year.

The language here does not amount to a prohibition, or a condition, or a warranty. The words without the exception would embrace all the tributaries of the above mentioned rivers. The exception has the effect of restraining or suspending the liability of the underwriters in a certain event. If the intention had been that the policy should be defeated by making voyages on any of the excepted rivers, that intention would have been expressed. But if there is any doubt about it, that exception being made by the parties for their own benefit to relieve themselves from a risk which they otherwise would have incurred, the doubt is to be resolved against them. The policy did not amount to a prohibition or warranty against navigating the excepted rivers, on the part of the assured, but to a suspension of the risk during the period the boat was so employed.

This is not like the case of *Stevens v. Conn. Mut. Ins. Co.*, 6 Duer, 594. There the policy of insurance on which the action was founded contained a warranty that the vessel insured should not use any port or ports in the Gulf of Mexico, and there was a plain breach of the warranty on the part of the assured.

The judgment is reversed, and, as there is no disagreement about the facts, judgment will be entered in this court for the appellants.

Judge Holmes concurs; Judge Lovelace absent.

Bateson v. Clark et als.

ALEXANDER BATESON, Respondent, *v.* HENRY L. CLARK *et als.*,
Appellants.

1. *Note—Presentment.*—To bind the endorser of a negotiable note, a presentment at the place of business of the maker, and a demand there made, is sufficient.
2. *Practice—Pleading.*—In a suit against the endorser, it is sufficient to set out the note according to its legal effect, and to allege that it was negotiable. It is not necessary to set out the note *in hoc verba*.—(See Jaccard *v.* Anderson, 32 Mo. 188; Lindsay *v.* Parsons, 34 Mo. 422; Simmons *v.* Belt, 35 Mo. 461.)
3. *Practice — Error and Exception.*—Distinction between error appearing of record and error appearing by exceptions.

Appeal from St. Louis Court of Common Pleas.

Kehr, for appellants.

I. The petition wholly fails to state a cause of action against the appellants. If they are to be held as endorsers of a negotiable note, the petition should allege that the note endorsed by them was "for value received, negotiable and payable without defalcation." Or if they are held as assignors of a non-negotiable note, the petition should state facts constituting their liabilities as such. Neither being done, the petition is wholly defective, and states no cause for action on which a judgment if rendered could be sustained. (Jaccard *v.* Anderson, 32 Mo. 188; Parsons *v.* Lindsay, 34 Mo. 422.)

II. If it be objected that this point not having been raised below cannot be made here, I reply "that for error apparent on the face of the record this court will reverse the judgment of an inferior court although no exception be taken therein."

1. The objection that the petition does not state facts sufficient to constitute a cause of action is never waived. (R. C. 1855, p. 1231, § 10, & p. 1301, § 35.)

The distinctions between exceptions taken at the trial and errors manifest on the record is palpable, and has always been recognized by the Supreme Court of this State, as well as by the appellate courts of other States.

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It will be found upon examination that all the Missouri cases in which it is held "that a party will not be allowed to urge in the Supreme Court a point that was not made in the Circuit Court," have referred without exception to matters arising upon the trial, and not to such as affect the pleadings or record. *Vide Alexander v. Hayden*, 2 Mo. 211; *Thomas v. Erskine*, 7 Mo. 213; *Cornelius v. Grant*, 8 Mo. 59; *Flor-esch v. Bank of Mo.*, 10 Mo. 515; whereas in *Carr v. Edwards*, 1 Mo. 137; *Hempstead v. Stone*, 2 Mo. 65; *Hayton v. Hope*, 3 Mo. 54; *Maupin v. Triplett*, 5 Mo. 422; *West v. Miles*, 9 Mo. 167, it has been uniformly held that for error apparent on the face of the record the Supreme Court will reverse the judgment of an inferior court although no exception be taken therein.

An objection to an indictment may be raised in the Supreme Court although not made in the Circuit Court. (*Mc-Walters v. State*, 10 Mo. 168.)

In *McGee v. State*, 10 Mo. 495, it is held that whatever may be taken advantage of in arrest of judgment, may be corrected by writ of error.

The judgment in *Fox v. Tooke et al.*, 34 Mo. 509, was reversed by the Supreme Court upon a point not made in the court below. (*Slocum v. Pomeroy*, 6 Cranch, 221.)

III. The mere fact that the notary went with the note to the maker's place of business and found no one there to answer his demand for payment, did not dispense with the necessity of any further effort to present the note. (Sto. on Prom. Notes, § 238; *Collins v. Balles*, 2 Str. 1087; *Lanusse v. Massicot*, 3 Martin, La. 261; *Granite Bank v. Ayers*, 16 Pick. 392; *McGruder v. Bank of Wash'n*, 9 Wheat.; Chit. on Bills, 7th ed., 164-246.)

IV. The evidence that the notary went with the note to the place of business of the maker in order to demand the payment thereof, and found no one there to answer respecting the same, does not sustain the allegation of the petition that the note was presented to the maker. Where facts are relied on as dispensing with actual presentation and demand,

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the *facts* constituting the legal equivalent should be stated in the petition. (Byles on Bills, 171, 337; Blakey v. Grant, 6 Mass. 386; Hill v. Varrell, 3 Greenl. 233.)

Farish, for respondent.

I. The instructions were properly refused; a demand at the place of business of the maker of a note is sufficient; and it is not necessary that the maker of the note should also be sought at his residence. (Sto. on Prom. Notes, § 235; Draper v. Clemens, 4 Mo. 52; Barrett v. Evans, 28 Mo. 231; Sanderson v. Reinstadler, 31 Mo. 483; Kleinman v. Boernstein, 32 Mo. 313; McKee v. Boswell, 33 Mo. 567; Miltenberger v. Spalding, 33 Mo. 421.)

II. The point in regard to the insufficiency of the petition was not raised below by demurrer, answer, or motion in arrest, and cannot arise here. It is not assigned here as error. (Haskell v. Sullivan, 31 Mo. 436; Richardson v. George, 34 Mo. 105.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought by the endorsee of a negotiable promissory note against the maker and endorsers. The first objection urged is that the demand of payment made by the notary of Clark, the maker, at his place of business, and during his absence, was insufficient to charge the endorsers; and that Clark having a known residence in the city, the demand should have been made there also.

The evidence in the case shows that Clark, the maker of the note, was a man of family, and that he resided with his family in the city of St. Louis, at the corner of Eighteenth and Locust streets, and that he had a place of business on Chesnut street between Second and Third. The notary testified that he presented the note at his place of business for payment, but did not find him or any one else there to answer the demand for payment, and that on the same day he gave notice of protest.

It clearly appears from the evidence that the place where

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the presentment was made was the maker's regular place of business, and where such is the fact a presentment and demand at that place, as well as a presentment and demand at his abode or residence, is good in law. Indeed, Parsons says, "it is clear that a demand at the place of business without any at the place of abode is sufficient, and this ordinarily would be the safest and most proper place to present the note." (1 Pars. on Notes & Bills, 422.)

In Van Vechten v. Pruyn, (3 Kernan, 549,) Comstock, J., said that the true rule was that when the service was not by mail, notice may be left indifferently at the dwelling or place of business.

But it is further objected that the petition is defective and does not state facts sufficient to constitute a cause of action. This objection was not raised in the court below, and no exceptions were taken, and it is insisted on here for the first time. Our statute has unquestionably made a distinction between what is properly matter of error and exception. By the Revised Code of 1855, p. 1300, § 33, "no exception shall be taken in an appeal or writ of error to any proceeding in the Circuit Court, except such as shall have been expressly decided by such court; but sec. 35 of same chapter requires this court to examine the record and award a new trial to reverse or affirm the judgment, or to give the proper judgment as may seem agreeable to law. The record proper, by law, is the petition, summons, and all subsequent pleadings, including the verdict and judgment; and these the law has made it our duty to examine and revise; and if any error is apparent on the face of these pleadings which constitute the record, we will reverse the cause, whether any exceptions were taken or not. Exception is matter which arises wholly from the action of the court in the progress of the trial, as the admission or rejection of evidence, the sustaining or overruling some motion, the giving or refusing of instructions, &c. This is strictly no part of the record unless made so by being incorporated in a bill of exceptions, and to entitle it to any notice or be made available here the

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action of the court must have been excepted to at the time the alleged error was committed. The material part of the petition which is alleged to be defective is in these words : "Plaintiff further states that heretofore, to-wit, on the 20th August, 1861, the defendant, Henry L. Clark, made his certain negotiable promissory note, in writing, which is filed herewith, dated St. Louis, August 20, 1860, by which he promised to pay, five months after date thereof, to the order of said defendants, Frederick Schulenberg and Adolphus Boeckeler, under their said firm of Schulenberg & Boeckeler, twenty-five hundred dollars, for value received, and with interest from maturity at the rate of ten per cent. per annum, and then delivered the same to said Schulenberg & Boeckeler, who afterwards and before the maturity of said note assigned the same by endorsements, in writing, and delivered the same to plaintiff for value."

The petition then alleges presentment and demand of payment, refusal to pay, and protest, &c. It is now said that because it is not alleged in the petition that the note made was "for value received, negotiable and payable without defalcation," it is fatally defective and insufficient to charge the endorsers, and in support of this is cited Jaccard v. Anderson (32 Mo. 188) and Lindsay v. Parsons (34 Mo. 422).

In Jaccard v. Anderson it was said, "the operative words in a negotiable note under the law of this State are, 'for value received, negotiable and payable without defalcation,' and their employment in the instrument declared upon must appear in the petition in order to enable the court to see and pronounce the legal effect of such instrument; and it was held if the petition did not set out these words, which in law made the note negotiable, it would not be sufficient to charge the endorser."

The petition in this case charges that defendant made his certain negotiable promissory note, in writing, which is filed &c., by which he promised, &c. This, it appears, is a definite substantive averment of its negotiability, and all that is requisite under the laws of pleading. It is not necessary to

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set out the instrument in *hæc verba*, but only according to its legal effect. There is a sufficient allegation of its negotiable character in the petition, and it is for the court to determine as a question of law, when the note is offered in evidence, whether it comes within the statutory privileges of negotiability, and supports the averment in the petition.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

MARK VASSAIER, Respondent, *v.* MALLET C. JACKSON,
Appellant.

Appeal from St. Louis Court of Common Pleas.

Krum & Harding, for respondent.

McClellan, Moodey & H., for appellant.

WAGNER, Judge, delivered the opinion of the court.

From the record in this case it appears that the only question presented for our consideration, is the sufficiency of the presentment and demand made by the notary. This question has already been decided by the court at the present term in the case of *Bateson v. Clark et als.*, and for the reasons therein given the judgment is affirmed.

Judge Holmes concurs; Judge Lovelace absent.

FOSTER et als., Respondents, *v.* FRIEDE et als., Appellants.

1. *Uses and Trusts.*—A party seeking to enforce a trust, to be entitled to relief in equity must show that a trust in the property was created for his benefit either in the sale of the property, or in some subsequent transaction.—Trusts are express or implied. An express trust is created whenever the legal estate is conveyed to one competent to take as trustee for the benefit of one capable of holding as a beneficiary. Implied trusts may be raised

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upon the supposed intention of the parties as shown by their actions. The former is created by the act of the parties, the latter by the act and construction of law.

Appeal from St. Louis Land Court.

This was a petition, the object of which was to obtain a decree for the cancellation of certain conveyances of real estate, and to recover the possession of the property and have the title decreed to plaintiff.

The amended petition, upon which the cause was tried, averred that John O'Fallon, by lease of February 10, 1848, leased to one Legrand F. Rucker, for the use of one Jane Foster, the property sued for, for ten years from the date of the lease; that the lease was executed by the parties (O'Fallon and Rucker) in duplicate, and the one kept by Rucker was for ten years from the 1st day of April, 1848, and the one kept by O'Fallon was for ten years from the 1st day of April, 1846, and that the one in Rucker's hands was the correct one; that, by a memorandum annexed to the lease, it was provided that Rucker should have the privilege of purchasing the property any time during the ten years at \$1,600, and receive a title in fee simple for the benefit of Jane Foster, and that the duplicate of this lease and the memorandum kept by Rucker were lost; that Rucker was dead, leaving his children, who are defendants, and Jane Foster was dead, leaving children who are defendants—and since filing the original petition James M. and Cassandra Foster died, leaving their father (Anthony M. Foster) and their brother and sister their heirs; that Meyer Freide, Anthony M. Foster, and Ann E. Rucker, with knowledge of the lease and memorandum, confederated together to get the property themselves at the price of \$1,600, and cheat the heirs of Jane Foster, and procure a conveyance of it from O'Fallon for \$1,500 to Ann E. Rucker; that A. M. Foster and Ann E. Rucker by fraud obtained this deed, and Friede knew it and assisted them by loaning Ann the money with which to purchase, and taking her notes endorsed by Thomas R. Rucker and a deed of trust to secure its payment; that Ann E.

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Rucker married A. M. Foster, and borrowed from Friede other money, for which she gave him her notes with said T. R. Rucker as endorser, and another deed of trust on the property to secure them, with usury; that on the 2d of July, 1858, Friede had the property sold under these deeds of trust, and at the sale he was the purchaser at \$4,000, and a deed was made to him, and the sale and deeds were void because Ann E. Rucker was the wife of Foster when one of the deeds of trust was made and he did not join her in the deed, and because Ann E. Foster (formerly Rucker) had not administered on Jane Foster's estate and had no right to make the deeds of trust, and because at the sale (by the trustee) Friede and A. M. Foster fraudulently agreed not to bid against each other, to cheat Jane Foster's heirs; that in July, 1858, after this sale, the interest of A. M. Foster in the property was sold by the sheriff under two executions against him, one in favor of Durkee & Bullock, the other in favor of one Heenan, at which sale Friede was the purchaser and obtained the sheriff's deed; that under the conveyances made to him Friede took possession of the property, and has collected rents, &c.; that Ann E. Foster (formerly Rucker) had no right to the property except as trustee for the heirs of Jane Foster, and no right to make the deeds of trust, and Friede knew it. The petition prayed that all of the conveyances be cancelled and set aside and the property decreed to the plaintiffs, and that they have possession, and that Friede account for all rents and profits, &c.

Defendant Friede answered. He denied that O'Fallon leased the property, on the 8th day of February, 1848, to Rucker for use of Jane Foster, for ten years from that date; he put in issue the execution of the lease in duplicate, as alleged, and the allegations in relation thereto; he averred that Anthony M. Foster was the husband of Jane Foster—was afterwards the husband of Ann E. Foster (formerly Rucker)—was the father of the plaintiffs—that he was the real party in interest as plaintiff in the suit. That in April, 1846, O'Fallon leased the property to said Anthony for the term of

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ten years, commencing April 1, 1846, and, with fraudulent intent towards his creditors, Anthony M. Foster surrendered this lease in 1848, O'Fallon not knowing of his intent, and procured O'Fallon (in lieu of it) to make the lease to Rucker for the benefit of Foster's wife, Jane, for the same term—that is, ten years from April 1, 1846—which is the only lease Rucker ever had; that the privilege of purchase was annexed to this lease, and Rucker thereby could purchase only by fully complying with all the terms of the lease as to rents, taxes, &c., and by paying the \$1,600 within the ten years specified—that is, by or before April 1, 1856; that this lease was procured to be made by A. M. Foster, for his own purposes and benefit, to cheat his creditors; he paid the rents, he improved the property, he claimed and used it as his own, and only had this second lease made to his brother-in-law Rucker for his wife's benefit, to defraud creditors, &c., and said Rucker was party to such fraud. He avers that said Rucker did not, nor did Jane Foster, nor Anthony, or any other person, comply with the privilege of purchase, or pay the money to O'Fallon, or purchase said property, under said written privilege, within the time therein specified, to wit, by or before April 1, 1856; that he knew nothing of any of the leases or contracts between Foster and O'Fallon, or Rucker and O'Fallon, until after they had all expired, or any of the circumstances connected with the property, and then he only heard of the two above referred to. He denied all knowledge—denied all charges of fraud, confederation, or design—denied any right ever acquired by Jane Foster or by Rucker; and averred that the interest in the leasehold belonged really to Anthony M. Foster, and by his fraudulent procurement and for his purposes to cheat his creditors the second lease was made to Rucker, but really for his benefit; that the first he knew of the property, and the first he had to do with any of the parties, was in April, 1856, at which time all right or power of Rucker under the memorandum of purchase of O'Fallon had expired, Anthony M. Foster came to him and represented to him that the lease had expired—that the time

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within which the privilege of purchase was given had expired—that the lease and power to purchase were really for his benefit—that he had put improvements on the property and it was greatly enhanced in value, and he was still very anxious, if possible, to make the purchase, but did not have the money for the purpose, and desired to borrow it from Friede; he proposed to give the note of Ann Rucker, endorsed by Thomas R. Rucker, to be secured by deed of trust on the property. That he afterwards loaned other money to Anthony M. Foster, getting notes of Ann Rucker endorsed as aforesaid, and secured by deed of trust on the property, seeing that the title was in Ann Rucker, and not knowing of any trust or any fraud of Fosters on the Ruckers, if there was any such. He denied all fraud, or knowledge of any if such there was, denied all knowledge of any trust, and denied that there was any in favor of Jane Foster or her heirs, and says he loaned the money in good faith. He says he does not know whether Ann Rucker and Anthony Foster were married when the second deed of trust was made, but says that they both declared themselves to be unmarried, and passed for single persons. He admits that in 1858, the notes to him being all due and unpaid, he caused the property to be sold under the trust deeds, and bid in and bought the property. He denies that there was any agreement or understanding with Foster, as alleged; but he bid and purchased in good faith—gave fair price to secure his debts. He admits that Anthony Foster's interest in the property was sold by some of his creditors under execution, and, hearing of it, he bid and purchased at such sale, fearing Foster had an interest subject to sale. He avers that he loaned his money honestly on the faith of the real estate security, not knowing of any trust or fraud; he now states there was no trust in favor of Jane Foster's heirs; if there was any fraud, it was Foster's fraud, of which he knew nothing; that he purchased the property fairly, at a fair price, and has a good honest title thereto, and this suit is a wicked fraud and contrivance of Anthony Foster to defraud him of his property.

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Anthony M. Foster, Ann E. Foster, John Rucker, John M. Wells, Louisa Wells, and Edward Rucker, failed to answer, and default was taken against them. The other defendants made a formal answer, saying they had no knowledge of the matter alleged sufficient to form a belief in regard thereto.

On this petition and answers the trial was had, on which trial plaintiffs read the lease from O'Fallon to L. F. Rucker, of date 10th February, 1848, for ten years from 1st April, 1846, with privilege of purchase during that term; also general warranty deed from O'Fallon to Ann Rucker, dated 21st April, 1856; also deed of trust of Ann Rucker to L. F. Strauss, trustee for Thomas R. Rucker, dated 21st April, 1856, to secure the notes which Meyer Friede first negotiated; also deed of trust of Ann Rucker to Strauss, trustee of Thomas R. Rucker, dated November 18, 1856, to secure the last notes which Friede discounted; also deed of trustee to Friede, at sale under these trust deeds, dated July 22, 1858; also deed from sheriff to Friede at sale under executions of Durkee & Bullock and Heenan, by Foster, dated 2d July, 1858.

The defendant Friede read in evidence the lease of O'Fallon to Foster for ten years, dated 1846; also O'Fallon's lease to Rucker for use of Jane Foster, with memorandum of privilege of purchasing therein; also the endorsement thereon of Helm, agent of O'Fallon, dated April 22, 1865—that the privilege of purchasing therein being forfeited, the property was conveyed to Ann E. Rucker; also certificate of marriage of Anthony Foster and Jane Rucker, dated June 23, 1856, filed for record September 16, 1856; also deed of trust from Anthony Foster to Phegley's trustee, dated 1846.

Many witnesses testified both on behalf of appellant and appellee, those on behalf of appellant tending to prove the allegations of his petition, and those on behalf of appellee tending to disprove the allegations of the petition and to prove the allegations of the answer.

No instructions were asked by appellant.

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The following instructions were asked by appellee and given by the court, to wit :

1. That if Jane Foster, for whose benefit the right of purchase was reserved in the lease to Legrand F. Rucker's trustee, died before consummating the purchase under the terms of the reservation, a mere verbal agreement on the part of O'Fallon that he would extend the time for the purchase, raises no trust for the benefit of the heirs of Jane Foster which a court of equity will enforce either against O'Fallon or any one purchasing from him.
2. Although Foster may have borrowed the money for the purpose of procuring the property for his children in good faith, and was perfectly solvent and in condition to make voluntary conveyance to his children, or to have it made to some one for them, yet such conveyance or creation of trust must be subject to the lien of Friede, who advanced the money ; and if the property was fairly sold under his deed of trust, even though he bought it for less than its real value, he is entitled to hold it discharged of any such trust, and cannot be required to give up his purchase upon payment to him of the money with interest.
3. If Foster, with the fraudulent purpose of obtaining the property for himself or for his children, and to prevent its being subjected to the payment of his debts, borrowed the money from Friede, purchased the property, and had the conveyance made to Ann E. Rucker that she might hold it in trust for himself or for his children, then a court of equity will not enforce such a fraudulent trust, especially if it be sought to be enforced against a purchaser for a valuable consideration.
4. No fraudulent conveyance made or procured to be made, nor any fraudulent creation of a trust made or procured to be made, can be held valid and binding upon a purchaser for a reasonable consideration, although he may have full knowledge of the fraud.
5. If Foster borrowed the money paid for the land, and had the conveyance made to Ann E. Rucker with the view

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of hindering, delaying or defrauding his creditors, and that he might thereby secure the property to the children of Jane Foster, and had an agreement or understanding with Ann E. Rucker that she would so hold it in trust for them, a court of equity will not decree the execution of such a trust against a purchaser for a valuable consideration, and in this case it matters not whether Foster was at the time solvent or insolvent.

Sharp & Broadhead, for respondents.

Casselberry and Mauro, for appellants.

WAGNER, Judge, delivered the opinion of the court.

As preliminary to the principal question arising in this cause, it may be stated that the point on which much stress is placed in the argument for the appellants, that the sale is invalid and of no effect because the second deed of trust was void, can have no bearing on the decision of the case. The only thing presented for our consideration is whether appellants are entitled to the equitable relief which they demand. To entitle them to such relief, it must be established that a trust was created for their benefit in the sale of the property by O'Fallon to Ann E. Rucker, or in some subsequent transaction in and concerning the same.

Trusts are either express or implied. Express trusts are created whenever the legal estate in property of any description is conveyed to one competent to take as trustee, to be held for the benefit of one capable of taking as *cestui qui trust*. Implied trusts may be raised upon the supposed intention of the parties, as expressed by their language, conduct, or in the nature of the transaction. (Tif. & Bul. on Trusts and Trustees, 11-20.) The first is created by the act of the parties, the latter by the act and construction of law. The evidence wholly fails to show that O'Fallon conveyed the property to Ann E. Rucker, clothed with a trust for Jane Foster's children. It clearly appears that the lease had expired ; that O'Fallon held the property unencumbered,

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and sold and conveyed it without imposing any trust; and there is no evidence that the purchase money was paid either by the children, or by any one for their use or benefit. Nor is there anything to show that, in any of the transactions which occurred afterwards, anything was done which would raise or imply a trust in their behalf.

It is unnecessary to discuss the question of fraud presented, as the appellants make no case entitling them to the interposition of a court of equity.

Judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

CITY OF ST. LOUIS TO THE USE OF JOHN LOHRUM, Respondent,
v. MARY E. COONS, Appellant.

1. *Constitution—City of St. Louis—Evidence.*—The act of the General Assembly of January 16, 1860, § 2, which authorized the City of St. Louis to assess the cost of macadamizing streets against the owners of the property fronting upon such streets, and providing that the certificate of the city engineer shall be *prima facie* evidence of the validity of the charge against the property, and of the liability of the party therein named as owner, is constitutional. The Legislature has power to provide a summary mode of collecting such taxes, and may declare what evidence shall be sufficient to show a *prima facie* case for the plaintiff.
2. *Courts—Jurisdiction.*—By the act of February 18, 1859, (Laws 1859, p. 487, § 4,) repealed by act of January 24, 1864, (Laws 1863-4, p. 307,) the St. Louis Circuit and Common Pleas Courts had concurrent jurisdiction with the St. Louis Land Court in all suits relating to lands, except those for the direct recovery of the possession of real estate.

Appeal from St. Louis Circuit Court.

The petition alleges, 1. That the defendant is the owner and in possession of a certain lot particularly described. 2. That the City of St. Louis, by authority of ordinance 4517, (not set out nor described or cited in any way,) contracted with said Lohrum for the macadamizing of a street, for the improvement of said street, in front of and adjoining defendant's property. 3. That said Lohrum performed said work

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in a skillful manner in accordance with his contract. 4. That said work, under laws then existing, was chargeable to the property adjoining and in the vicinity thereof. 5. That the city engineer had charge of said work, and when the same was fully completed, computed the cost thereof, and assessed it as a special tax against the adjoining property fronting on said work; also charging each lot of ground in proportion to the frontage thereof with the cost of constructing, reconstructing and repairing the intersections of the next adjoining streets, alleys and other public highways in a manner by said officer deemed just and equitable. 6. That the just proportion of said work assessed as aforesaid and chargeable to the property of the defendant was the sum of \$153.49. 7. That the city engineer, being the officer in charge of said work, made out a certified bill of his assessment for each lot against the owner thereof, and a certified bill for the said sum of \$153.49 against the defendant as owner of the lot described, and delivered the same to the said John Lohrum, which is filed with the petition. 8. That by force of premises said bill became a lien and has not been paid.

The petition concludes with a prayer for judgment, with fifteen per cent. damages, the penalty provided by the act; and also prays that said judgment be made a special lien on the property.

The answer puts in issue every material allegation of the petition. Upon the trial the only evidence offered by the plaintiff was to prove the signatures of the city engineer and tax clerk to the certificate dated February 18, 1861; also that the city engineer had charge of all the work of the kind specified in said certificate, and read said certificate in evidence. The defendant duly objected and excepted to the admission of the certificate. This was all the evidence heard in the cause. The defendant upon this evidence asked the court to declare "that upon all the evidence offered by the plaintiff and heard in the case, he was not entitled to recover in this action against the plaintiff." The court refused the instruction, and the defendant excepted. The plaintiff filed a

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motion for a new trial ; also filed a motion in arrest of judgment, for these reasons : 1. Because no cause of action against the defendant is stated in the plaintiff's petition ; 2. Because, upon the pleadings and proof in the case, the plaintiff is not entitled to judgment as rendered by the court.

Krum & Decker, for appellant.

I. The instruction asked by the defendant should have been given, and its refusal was error. This instruction is tantamount to a demurrer to the evidence. It admits every fact and every conclusion that legitimately can be drawn from the facts established in evidence in the case. The whole evidence does not make a case against the defendant.

Admitting, for the purpose of the argument, that the petition states a cause of action against the defendant, yet the evidence adduced does not prove the case stated. The material averments which constitute the gist of the action, as stated in the petition, are that the defendant owned the real estate fronting on the street mentioned ; that under the authority of ordinance 4517, the City of St. Louis contracted with John Lohrum to furnish the materials and do the work in question, and that he furnished the same, and that the city engineer computed the cost of said work, and certified the amount thereof in the form of the certificate mentioned, &c., &c. These material averments are traversed by the answer. The plaintiff relied on the force and effect of the engineer's certificate. By statute it is made *prima facie* evidence of the validity of the charge.

The city engineer can only make a certificate of this kind in a case where authority is given by the city council to make a contract for materials and labor, &c., and a contract is made in pursuance of such authority. In this case the plaintiff did not produce in evidence the authority to make the contract in question, nor the contract itself. Upon the existence of these depended the authority of the city engineer to make the certificate in question. The existence of

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the alleged contract and the authority to make it cannot be presumed, but must be proved.

II. It cannot be claimed that it is *prima facie* evidence of anything not stated in the certificate itself. At best, it can only be claimed that it is *prima facie* evidence of the facts stated in the certificate. It does not state that defendant is the owner of the property.

The Circuit Court of St. Louis county has no jurisdiction in cases of this kind. This is a suit to enforce a lien upon real estate—this is patent on the face of the plaintiff's petition. The St. Louis Land Court has exclusive jurisdiction in such cases. (R. C. 1855, p. 1592.)

Warner, for respondent.

I. There was no error in refusing defendant's instructions. The bill given in evidence states : 1. That the defendant is owner of the property therein described. 2. That certain work, also described, was done by John Lohrum. 3. That this work was done under authority, or ordinance. 4. Under contract with the City of St. Louis. 5. That the cost of said work was chargeable to the property described in the bill. 6. That the charge for said work is correct, and due by defendant to said Lohrum.

The signatures of the city engineer and of the special tax clerk to the bill were proved on the trial, and defendant admits that it is evidence of the facts stated in it. How can it be claimed, then, that in the absence of any rebutting proof, the material averments are not sustained by it ?

II. The statute cited by defendant provides that "the cost of paving, macadamizing, &c., all streets, &c., in the city of St. Louis, which, under existing laws, is chargeable to the property adjoining or in the vicinity of such work, shall be charged and collected as therein provided." Section 1 of "An act supplementary to the several acts to incorporate the City of St. Louis," approved March 5, 1855, (p. 179 of Rev. Ord. 1861,) provides that "the cost of grading, paving, &c., of any street, or portions of any street, &c., shall be borne by

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the owners of the adjoining property." Section 2 of the first-mentioned act (Rev. Ord. 1861, p. 227) provides that "the city engineer, or other officer having charge of such work, shall compute the cost thereof, and assess it as a special tax upon the adjoining property fronting upon the work done," &c.; "the said officer shall then make out a certified bill of such assessment against such lot of ground, chargeable with the work done, in the name of the owner thereof; said certified bill shall be delivered to the contractor for the work, who shall proceed to collect the same by ordinary process of law," &c.; "and each certified bill shall be a lien against the lot of ground described therein, and shall bear interest," &c., * * * "and if not paid within six months after the date of its issue, it shall bear interest at the rate of fifteen per centum per annum," &c.

Until the contrary is proved, it would appear undeniable that the person named in the bill as the owner of the property is liable to the person therein named as having done the work for the amount thereof, with the amount of interest fixed by statute in such case.

HOLMES, Judge, delivered the opinion of the court.

The petition which was filed in the St. Louis Circuit Court on the first day of August, 1860, appears to have stated all the facts which were necessary to constitute a cause of action against the defendant, founded upon the special tax bill. The answer specifically denied all the material allegations. The plaintiffs proved that the city engineer had charge of all work of the kind specified in the certified tax bill. He then read the certified bill in evidence, the defence, and excepting, and closed his case. The defendant asked the court to instruct the jury to find for the defendant. The instruction was refused, and there was a verdict and judgment for the plaintiff.

The statute provides (act of January 16, 1860, § 2) that every such certified bill shall, in any action brought to recover the amount thereof, be *prima facie* evidence of the validity of

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the charge against the property therein described, and of the liability of the person therein named as the owner of such property. The certified bill is then made presumptive evidence of all the facts necessary to make it a valid charge against the property, and of the fact that the person therein named as owner is liable as such owner of the property for all the purposes of the suit; and the burden of proof is thereby thrown upon the defendant to rebut such presumption or *prima facie* case of liability. There can be no doubt of the power of the Legislature to provide a summary mode of levying and collecting such taxes, nor that they may declare what evidence shall be sufficient to show a *prima facie* case for the plaintiff. The court had jurisdiction of the parties and of the subject-matter of the action, and the judgment is certainly binding on them. Of course, no person or owner who has not been brought within the jurisdiction of the court as a party, can be bound by the proceedings and judgment. (Black. Tax Tit., 2d ed., 25, 184.)

The point is raised on motion in arrest that the St. Louis Land Court had exclusive jurisdiction of all actions "for enforcing any right, claim, demand, or lien, to or upon" real estate. This would have been so under the act establishing that court, (R. C. 1855, p. 1592, § 2,) but the act of February 18, 1859, (Laws of 1859, p. 457, § 4,) gave the Circuit Court and Court of Common Pleas of St. Louis county concurrent jurisdiction with the St. Louis Land Court "in all suits and actions, except those for the direct recovery of the possession of real estate"; and this act was not repealed until the 26th day of January, 1864, (Laws of 1863-4, p. 307,) and the record showed that the whole proceedings and judgment in this case took place during the period of time in which the St. Louis Circuit Court had jurisdiction of such cases.

We think the plaintiff was entitled to recover on the case made, and that the defendant's instruction was correctly refused.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

Ford v. Angelrodt et al.

LUTHER R. FORD, Appellant, *v.* ERNST C. ANGELRODT AND
ROBERT BARTH, Respondents.

1. *Bill of Exchange—Acceptance.*—The holder of a bill of exchange is entitled to an absolute and unconditional acceptance according to the tenor of the bill, and may reject any other. If he rely upon a conditional acceptance, he must show affirmatively that the condition has been complied with.
2. *Account—Assignment—Bill of Exchange.*—Under the statute, an account may be assigned in writing. A bill of exchange drawn upon a particular fund does not operate as an equitable assignment of the fund although the drawee promise to pay any balance that may be in his hands. (*Kimball v. Donald*, 20 Mo. 577.)

Appeal from St. Louis Court of Common Pleas.

This was an action brought by plaintiff against defendants on a bill of exchange or draft for \$387.47, drawn by one Charles W. Wernz on the defendants. The plaintiff in his petition alleged that on the 9th day of May, 1857, the defendants rendered to one Charles W. Wernz "an account stated," whereby they acknowledge that they owed said Wernz the sum of \$387.47; that Wernz on the 3d of September, 1857, and for value received, assigned and delivered to plaintiff said account, and then and there made his certain writing, paper, or draft, whereby he ordered the defendants to pay to the order of Elias Brevort, at sight, the sum of \$387.47, the balance due as per their statement of January, 1857, thereby ordering the payment due on said account; that Wernz delivered the draft to Brevort to collect the same for plaintiff; that Brevort endorsed the draft to W. S. McKnight & Co. to collect the same for plaintiff; that in September, 1857, Wernz ordered Brevort to pay to plaintiff whatever he might collect from defendants; that Brevort agreed to do so; that the draft was presented to defendants, and they accepted the same; that on 29th October, 1857, the draft was presented to defendants for payment; that payment was refused, and the draft protested in due form for non-payment; that afterwards in 1861 W. S. McKnight, the holder of the draft, endorsed it over to plaintiff; that he is the legal holder and owner thereof, and

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as such asks judgment for principal, interest, damages and costs, and also prays for general relief.

The answer of the defendants admitted that they had in their hands \$387.47 belonging to Charles W. Wernz, and subject to his order; asked proof of the assignment of the account, of the drawing and endorsements of the draft, and denied the acceptance by defendants of the draft sued on. The answer further alleges that in 1858 and in 1859, and before the commencement of this action, Wernz, the drawer of the draft, directed the defendants not to pay the money in their hands to plaintiff, or any other person, unless ordered by plaintiff.

To support the issues made by the pleadings, the plaintiff give in evidence an account between Angelrodt & Barth and C. W. Wernz, commencing in January, 1854, running to January, 1857, and dated May 9, 1857; the account showed a balance of \$387.47 in favor of Wernz on that day.

The plaintiff proved by the defendant Barth that said account was rendered by Angelrodt & Barth to Wernz and sent to him at New Mexico; that the amount of said account was all they owed Wernz, and that they still had that amount in their hands.

There was no evidence tending to show when the account was received by Wernz, nor was there any evidence given by plaintiff of an assignment, in writing or otherwise, of this account, or of the amount therein specified to be due, except as hereinafter stated.

The plaintiff also gave in evidence a paper without any date, nor directed to any person, but proved to have been signed by Angelrodt & Barth:—"The two receipts must be signed by Mr. Wernz with his full German names, viz., Carl Wilhelm Wernz, and not Charles W. Wernz, in presence of a civil officer who keeps a seal, and both certified by said officer. The best is a clerk of a court, as a notary public has to attach the certificate of the Governor to his own. If Mr. Wernz was near Santa Fé and could sign the two receipts before C. P. Clever, Esq., at that place, whose signature and

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seal are known to me, it would be best, and needs not the Governor's certificate. By receipt of these two documents, Mr. Wernz's draft will be promptly paid by Angelrodt & Barth at their office. Yours, &c., E. C. Angelrodt."

There was no parol evidence whatever tending to show to whom this paper was directed, by whom delivered, when it was executed, or to what particular draft or transaction it referred.

The plaintiff also gave in evidence a draft in the following words :

Fort Buchanan, N. M., Sept. 3, 1857.

Gentlemen :—At sight, please pay Elias Brevort, or order, three hundred and eighty-seven (\$387) $\frac{47}{100}$ dollars, due as per statement January, 1857.

\$387.47.

CHARLES W. WERNZ.

Messrs. Angelrodt & Barth, St. Louis, Mo.

[Endorsed,] Pay to W. S. McKnight & Co.—Elias Brevort.
[and] Pay to Luther R. Ford, or order, without recourse on us. March 13, 1861.—Wm. S. McKnight & Co.

To this draft is attached a notarial protest in due form and dated October 29, 1857.

The plaintiff proved the handwriting of Wernz, the drawer, and of Brevort and McKnight, the endorsers ; that the draft was sent by Brevort to McKnight for collection ; that after the draft was protested, it was delivered by McKnight to plaintiff. It appears from the face of this paper that the assignment of the draft to Ford was made more than three years after the protest.

The plaintiff also offered in evidence a paper in the following words :

Mr. E. Brevort :—Please deliver to L. R. Ford the money, draft, or check, that you may receive for or upon the papers forwarded to St. Louis by you for me. Fort Buchanan, N. M., Sept. 16, 1857.—C. W. Wernz.

Accepted.—Elias Brevort.

And the plaintiff proved that the signatures of C. W. Wernz and Elias Brevort on said paper are genuine.

There was no evidence tending to show that any other pa-

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per than the draft was ever sent to St. Louis by Brevort, nor was there any evidence tending to show how the plaintiff obtained possession of the account rendered by Angelrodt & Barth to him.

The defendant offered evidence tending to show that, in 1859, Wernz repeatedly wrote to and directed the defendants not to pay any money to the plaintiff, but to await his further orders.

The plaintiff then asked four instructions, all of which were refused; and the court gave an instruction, that upon the evidence the plaintiff could not recover.

The plaintiff took a non suit, filed his motion for a new trial, (which was overruled,) and perfected his appeal.

Mumford, for appellant.

I. The first question in this case is, was there a transfer of a particular or a specific fund to the plaintiff? In the case of *Rochet v. Grandell*, 15 Eng. L. & Eq., is the latest and ablest review of the law as to what will amount to a transfer of a particular fund. The law, as there stated, is, that "any agreement between a debtor and a creditor that the debt owing should be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debt or fund to which the order refers."

It is certainly the fact that a general bill of exchange before acceptance will not operate as an assignment for the amount that it calls for, but it is as certainly true that an order or a bill for a specific fund will operate as an assignment of the fund. (*Smith v. Sterrett*, 24 Mo. 262.)

If there is any evidence of the slightest character to establish the case, the court cannot take the case from the jury. In this case it will be seen by the pleadings, the petition, and answer, that the plaintiff alleged an assignment of the account

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to him, and gave in evidence the account, the order on the defendants, and the order in writing to Brevort to pay to the plaintiff, which B. accepted. From this and other facts, the court had no right to take the case from the jury. The jury are the sole judges of the weight and sufficiency of the evidence, and the court cannot be judge to expound the law and jury to judge of the weight of evidence; then from the evidence in this case the plaintiff had the right to go to the jury on the case he made, and the court erred in refusing his instructions, and in giving the instruction that he could not recover. (Winston v. Wales, 13 Mo. 569; McGover v. Whitney, 1 Mo. 613; Whitney v. State, 8 Mo. 165; Hulseman v. Citizen's Railw. Co., 34 Mo. 45.)

Courts of law will protect assignments. (R. C. 1855, § 8, p. 371, and cases there cited; 17 Johns. 97.) An order for the whole amount is an assignment. (Walker v. Mauro, 18 Mo. 564.)

Taussig & Kellogg, for respondents.

I. The plaintiff has failed entirely to prove that defendants accepted the draft sued on. The paper given in evidence is no evidence of the acceptance of the draft.

II. If the plaintiff has failed to prove an acceptance, it matters not whether the evidence discloses a state of facts upon which the plaintiff could recover. If the plaintiff intended to recover of the defendants as the assignee in equity of the amount due by defendants to Charles W. Wernz, he has set forth no such case in his pleadings and cannot recover on that theory. (Link v. Vaughn, 17 Mo. 585; Beck v. Ferrara, 19 Mo. 30; Duncan v. Fisher, 18 Mo. 403; Robinson v. Rice, 20 Mo. 229; Pensenneau v. Rice, 22 Mo. 27.)

We contend that a draft or bill of exchange drawn by a creditor on his debtor cannot, before acceptance, take effect as an equitable assignment of the fund on which it is drawn, although there may be directions at the foot of the bill charging or designating a particular account. (Kimball v. Donald, 20 Mo. 577.)

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LOVELACE, Judge, delivered the opinion of the court.

The question in this case is whether the court erred in taking the case from the jury, by instructing them that upon the evidence the plaintiff could not recover. Two points are raised by the bill of exceptions and brief: *First*—The plaintiff insists that the defendants accepted the bill sued on, and seeks to recover on their acceptance. *Secondly*—The plaintiff insists that there was an equitable assignment of the funds in the hands of the defendants belonging to the drawer of the bill.

I. The evidence shows that the defendants agreed to pay the bill provided the plaintiff would procure certain receipts from Wernz, the drawer of the bill, who at that time lived in New Mexico, and these receipts were never procured. This conditional acceptance was written on a separate piece of paper and made no reference whatever to the bill in question. But there were other circumstances in the case that would enable the jury to determine whether the conditional acceptance referred to this particular bill, and so far as that was concerned it might have been submitted to the jury. But there was no evidence showing, or tending to show, that the conditions of the acceptance were ever complied with by the holder of the bill; indeed, the plaintiff's counsel admits that they never were. The holder of a bill is entitled to an absolute and unconditional acceptance according to the tenor of the bill, and he may reject any other. (Sto. on B., § 240.) But if he relies on a conditional acceptance, he must show affirmatively that the condition has been complied with.—(*Id.*) The drawee of a bill is under no legal obligations to the holder to accept, and he may impose any conditions on the acceptance that he sees proper, and the holder or payee may rely on the acceptance and comply with the conditions, or he may reject it and have his bill protested for want of acceptance. In this case there was no evidence to show that the payee had ever complied with the conditions of the acceptance, and therefore there was no evidence upon which

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the plaintiff could recover upon an accepted bill, and in this respect the court below committed no error; and this, perhaps, would be sufficient to dispose of the case, for the petition clearly seeks to recover upon an accepted bill. But inasmuch as the bill of exceptions and briefs of the parties raise the other question, it might as well be decided.

II. Did the bill operate as an equitable assignment of the funds belonging to the drawer in the hands of the drawee? The facts as proven show that on the 3d September, A. D. 1857, one Charles W. Wernz executed and delivered to Elias Brevort a certain written order, of which the following is a copy: [See statement, p. 52.]

The evidence also shows that at the same time Wernz executed the above order, he delivered to Brevort a statement of accounts rendered by defendants to Wernz, showing an indebtedness on the part of defendants to said Wernz in the sum of three hundred and eighty-seven 47-100ths dollars; and that Wernz gave an order to Brevort, at the same time, to deliver to the plaintiff the money, draft, or check, which he might receive on said papers.

Upon this state of facts, it is contended that there was an assignment of the fund in the hands of defendants to the plaintiff. Under our statutes an account may be assigned in writing, and it is not absolutely necessary that the assignment should be upon the same piece of paper with the account; but the assignment ought to show with reasonable certainty a present intention on the part of the assignors to transfer the account, and a present willingness on the part of the assignee to accept the account; and where it is perfectly convenient for the parties to write the assignment on the account, it is certainly the easiest way to express the intention of the parties; and it will at least throw some doubt upon the intention of the assignor, when the account is in the possession of the assignor at the time it is claimed that the assignment was made, and he fails to endorse the assignment on the account. If Wernz intended to assign the account

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to the defendants, why did he not write an assignment on the back of the account and send it at once to the plaintiff? Why the necessity of this separate order, payable not to the plaintiff but to Wernz's own agent, unless he intended to retain some control over the fund? But the transaction wants one very essential element of an assignment. It nowhere appears that Wernz ever delivered the account to the plaintiff, or ever ordered any person to deliver it to him: he ordered his own agent (Brevort) to collect the order or draft which he gave him on the defendants and pay the proceeds to the plaintiff. From anything that appears in the evidence, there was no privity of contract whatever between Wernz and the plaintiff; and the only right of action which the plaintiff shows is the draft or bill sued on, which was endorsed by Brevort to McKnight & Co., and by McKnight & Co. to the plaintiff.

But, after all, the instrument sued on is a bill of exchange, and not a mere order to pay over a particular fund. (Sto. on B., § 3.) It is payable to Brevort, or order. It shows upon its face that it was intended to be negotiated, and it was negotiated, and it is only by virtue of its negotiable character that the plaintiff has acquired any title in it; and, we think, that after being refused acceptance it would not operate as an equitable assignment of the fund. In Kimball v. Donald, 20 Mo. 577, it was held by this court, that a bill drawn upon a particular fund mentioned in the bill could not have the effect of an equitable assignment, although the drawee had promised to pay any balance that might be in his hands. In this case if the bill was to have the effect of an equitable assignment, that equity must be in favor of the payee mentioned in the bill; but he treated it as a mere bill of exchange, and so did his assignees, McKnight & Co.

In Kimball v. Donald, Judge Leonard, adopting the language of Lord Chancellor Truro, in Haddock v. Gaudell, (15 Eng. L. & Eq. 30,) says: "An agreement between a debtor and a creditor that the debt owing should be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding

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funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund ; in other words, will operate as an equitable assignment of the debt or fund to which the order refers." "But," says the same learned judge, "if there be anything from which a different intention ought to be inferred, as where the fund is to pass at a future day, the matter resting for the time being in agreement, or where the party retains the subject under his own control by giving the order, not to the assignee but to his own agent, the transaction is not allowed to have the effect of a present transfer."

The case at bar falls within two of the exceptions named in Kimball v. Donald: 1. The proceeds of the draft were to pass to the plaintiff at a future time—that is, after Brevort had collected it from the defendants; and 2. Wernz retained control over the subject by giving the order to his own agent.

We think there was no evidence showing an assignment under the statute, or an equitable assignment of the fund in the hands of the drawee. There was no error in the court instructing the jury that there was no evidence upon which the plaintiff could recover.

Judgment affirmed. The other judges concur.

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THE STATE OF MISSOURI, Respondent, *v.* HENRY S. SMITH,
Appellant.

1. *Crimes—Receiving Stolen Goods—Criminal Practice.*—In an indictment charging the defendant with receiving stolen goods with a guilty knowledge, it is not necessary that the name of the person who stole the goods should be stated.
2. *Criminal Practice—Receiving Stolen Goods.*—Where a defendant is charged with having received stolen goods jointly with others, he may be convicted if the evidence show that himself separately received the property.
3. *Criminal Practice—Receiving Stolen Goods—Evidence.*—Upon an indictment for receiving stolen goods, knowing them to have been stolen, the State must prove that the property was stolen and that the defendant received the property knowing it to have been stolen; and all the acts which go to prove the fact of the stealing are properly admissible in evidence as part of the *res gestae*.

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*Appeal from St. Louis Criminal Court.**Krum & Shreve, for appellant.*

While the indictment contains thirteen counts, the 1st, 2d, 3d, 8th, 11th and 12th counts were withdrawn from the jury ; the 4th, 5th, 6th and 10th counts contain the same material averments, all charging a joint receiving of the stolen property by three different persons, varying only in the allegation of the ownership of the property without naming the thief ; the 7th and 13th counts contain a joint charge of receiving property which had been embezzled, knowing it to have been so embezzled, varying only in the ownership.

The first question which presents itself is : If parties are jointly indicted for receiving stolen or embezzled property, must the *allegata* and *probata* correspond in this as in other cases ? The technics of the law require it, as the authorities cited sufficiently show. Does not the philosophy of the law also demand that proof shall be made that whatever possession the parties may be shown to have in the property stolen was a joint possession, not an individual possession ? (See authorities cited in *Regina v. Wiley*, Brit. Cr. Cas. 6-43 ; 2 Eng. L. & Eq. 532 : *Rex v. Hartwell*, 7 C. & P. 476.)

The thief ought to be named as well as the murdered man. The statute equally requires it. (13 Ired. 338 ; 4 Yerg. 149 ; *Lewin Cr.* 117.)

It is not necessary to aver in an indictment for receiving stolen property that the principal or thief has been convicted, nor to prove it ; but it is clearly, on principle and our statute, incumbent on the prosecution to charge and prove the principal. (§ 44, p. 58.)

II. The admission by the court of the declaration of Charles Noyes to the witness Hard, and by him detailed in evidence before the jury, it is submitted was great error—an error in which it is difficult to understand how the court below could have fallen ; its admission subversive of the first rules of evidence ; it is hearsay testimony and cannot be tortured into anything else. It permits the declarations of a co-defendant,

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of a party jointly indicted, jointly impleaded in crime, to become evidence against such co-defendant, such jointly impleaded party, in his absence—some of the declarations being anterior, and some subsequent to the commission of the offence. This would not be tolerated even in a case of conspiracy. In support of this the court is referred to Whart. 295-7; 15 Mo. 168; 29 Mo. 32-50; 34 Mo. 85.

It was incumbent on the State to prove that the money was stolen before defendant could be convicted of its felonious reception. But it must be proved by legal testimony, not by the declarations of other parties; and the statement of Noyes to witness Hard was no more testimony than if some other person had made the statement. No conspiracy between Noyes and defendant is even pretended, much less proven.

The admission of this testimony prejudiced the jury against the defendant. It tended to connect the defendant with the transaction in all its enormity, when he knew nothing of it in fact. The admission of such testimony is most prejudicial; it cannot be erased from the jury even by instruction. Like the blood on Macbeth's hands, it will incarnadine a sea of water. This court has repeatedly warned against the dangerous and pernicious practice of admitting testimony which may prejudice the defendant before the jury. (See authorities cited.)

Lackland, Cline & Jamison, for respondent.

By the statutes of the State the receiving of stolen goods, knowing them to have been stolen, is made a substantial felony, and it can be joined in the same indictment with counts for burglary, larceny and embezzlement. (R. C. 1855, § 23, p. 1176, art. 3, §§ 19 & 22, and art. 9, §§ 14, 15, 16 & 18; 16 Mo. 550.)

The true test of practice in the joinder of counts in the same indictment is: if the offences are of a different nature, and the same plea may be pleaded, and the offences are punished by its law in the same manner, they can be joined, although our courts always prevent the too free mode of joining counts for totally distinct classes of cases in the same

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indictment, although plead to and punished in the same manner, (as rape and robbery,) for the reason that it might embarrass the defendant in his defence, or cause undue prejudice against him before the jury. These reasons, however, do not apply when the pleader adopts a variety of counts in the same indictment for the purpose of meeting the evidence on the trial, and when all of the counts, though charging different offences, evidently refer to the same transaction. This is a latitude always indulged in by our best and most accurate criminal pleaders, and indeed was absolutely necessary to be adopted for safety, before the enlargement of our statutes of jeofail, which the court will see, from the foregoing references, have become so liberal that the criminal pleader can charge a delinquent with one offence, and at the trial, without amendment, acquit him of that and convict him of another and different offence. The accused ought therefore not complain of the pleader in this cause, for having beforehand given him his indictment, or full, complete and formal statement of the crime of which he was found guilty. (Wheat. Cr. L. 667.)

What criminal pleader could contend for this proposition when all indictments and each count, although framed against many defendants, have ever been regarded as joint and several ? and in fact this is the first time in the history of our practice that we have ever heard a contrary doctrine contended for. We are, of course, aware that each count in this indictment embraces a single substantive felony, and that in all cases the evidence introduced under a single count must be confined to a single transaction ; and if the transaction involves the guilt of all the defendants under, that count, then all must be convicted ; but if it does not, then those only are properly convicted who are guilty ; and if there be two or more counts, one of the defendants may be convicted on one count, while the other may be convicted on the other. Here the court must perceive that there can be a joint charge in the different counts of the same indictment against two or more defendants, with a several conviction

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against each upon separate, distinct, and substantive felonies, which are properly joined in the same indictment under the rules of law heretofore cited.

If this be true, then the argument of the counsel for the accused is not only circular and therefore vicious, but also suicidal within itself. There is but one receiving in proof and that was committed by the accused, and the verdict is general and announces his guilt. He might as well claim his discharge because the evidence did not show that some one else, who was a total stranger to the record, was not also jointly guilty with him. (Regina v. Davey & Gray, 2 Eng. L. & Eq. 532; 38 Eng. Com. L. 121 & 157; Regina v. Smith, 33 Eng. L. & Eq. 531.)

The next and only remaining point to be noticed in this case: was there any error in the admission of evidence on the trial? To maintain the charge of receiving against the accused, it was incumbent on the State to prove the original taking as well as the guilty receipt; and hence all matters, manipulations, and plans, connected with the robbery, were competent proof; and for this purpose the actors were competent witnesses against the receivers; and all that was done and said by them in perfecting and executing this scheme was part of the *res gestae* and proof, and, although the accused was not present at the commission of the offence, and stands here to-day convicted of a separate and distinct offence made by our law a substantive felony, yet, for all the practical purposes of the trial, the case still stands as it did at common law, where the receiver was regarded as an accessory after the fact. The rules governing the competency and production of the evidence remain the same, except that no conviction or outlawry need be alleged or proven to secure the conviction. The office he undertakes to perform for his co-defendants is to secrete the fruits of their crime.

We do not contend that the body of the original felony could be proven by the confession of the principal actors, thereby dispensing with proof *aliunde*. Nor has this been done in the case at bar. Proof has been made of all that

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has been done by the different actors, from the original conception of the crime until its final consummation. And the accused now complains of the court below for permitting Hard, the accomplice, to state what he and Charles Noyes said to each other about the robbery whilst engaged in the shifting scenes and transactions which go to make up its history.

It is unnecessary to refer to authorities to support the rulings of his honor, the *nisi prius* judge, on this point, for the reason that, whether they were proper or improper, they are wholly immaterial to the defendant. He was in nowise prejudiced or affected by the proof; it could neither mislead nor prejudice the jury in passing upon the guilt or innocence of the accused. This court has repeatedly decided that a judgment will not be reversed because irrelevant testimony was admitted, unless it is calculated to mislead or prejudice the jury, and the rule in criminal cases is the same in this particular that it is in civil cases. (*McDermott v. Barnum*, 19 Mo. 204.)

LOVELACE, Judge, delivered the opinion of the court.

Several errors are complained of by the defendant, but they may all be properly discussed under four heads: 1. The indictment charges the defendant with receiving stolen property, knowing it to be stolen, without naming the thief; 2. The indictment charges the defendant, jointly with Charles Noyes and Friend Noyes, with receiving the property, when the evidence tends to prove that the defendant alone received it; 3. It is complained that the court admitted improper evidence on the part of the State, and excluded proper evidence on the part of the accused; and 4. That the court misdirected the jury as to the law in the case.

I. As to the first point, that the indictment fails to state the name of the thief or principal felon, the elementary books seem to settle the question and place it beyond argument. The *gravamen* of the offence is receiving stolen goods, knowing them to be stolen. It is a substantive felony. It

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is a crime within itself; and the name of the person who stole the goods is immaterial. (Arch. Crim. Pl. 256; Roscoe, Crim. Ev. 804; Stark. Crim. Pl. 186; Whar. Crim. Law, 679-80.) The adjudged cases are to the same effect. (Rex v. Jervis, 6 Car. & P. 156; Rex v. Wheeler, 7 Car. & P. 170; Swaggerty v. The State, 9 Yerg. 338; State v. Copperburg, 2 Strob. 273.) It is true these decisions are made under statutes, but so far as this question is concerned the statutes under which these decisions are made are exactly similar to our own.

II. It is insisted on by defendant's counsel that inasmuch as the indictment charges the defendant with receiving the stolen goods jointly with Charles Noyes and Friend Noyes, and the evidence showed only a separate act of receiving by the defendant, he ought not to be convicted. That the *probata* and *allegata* ought to correspond, and to support an allegation of joint receiving there must be proof of joint receiving, and proof of a separate receiving will not be sufficient; and in support of this several cases have been cited, the leading one of which is Rex v. Messingham, 2 Brit. Cro. Cas. 257. Two persons, Mary Messingham and John Messingham, were upon a joint indictment charged with receiving 50 pounds weight of pork, of the value of 20s., of the goods and chattels of John Fisher, then lately before feloniously stolen, taken and carried away by some evil disposed person to the jurors unknown, well knowing the goods and chattels aforesaid to have been so as aforesaid feloniously stolen, &c. It was proved by satisfactory evidence that the meat was the property of John Fisher; that it had been stolen from him by some person unknown, and that both the prisoners knew it to have been stolen. The meat was found in the pantry of a cottage belonging to Mary Messingham, in which John Messingham, her son, and his children lived with her. Mary Messingham had the key of the pantry at the time the meat was found. The statements of the prisoners were given in evidence, which showed that a man gave a bag to John and told him to take it home and leave what was in it until he called for

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it, and return the bag to him again. John took the bag in-doors and opened it and took out several pieces of hog meat and laid them on the stool in the pantry, and then returned the bag to the man again. When his mother returned home that evening he related the circumstance to her. Mary Messingham said in her statement that the meat was her son's meat; that he brought it in-doors on Saturday and she salted it. Both prisoners were convicted. It was objected at the trial that Mary Messingham could not be legally convicted jointly with John Messingham upon this indictment; first, because the offence of John Messingham was complete before Mary Messingham took any part in the transaction; and, secondly, because she did not receive the meat of an unknown thief, as alleged in the indictment, but of her son John. The question for the consideration of the judges was, whether Mary Messingham was properly convicted, and the judges were unanimously of the opinion that on the point charged it was necessary to prove a joint receipt, and as the mother was absent when the son received, it was a separate receipt by him.

It will be observed that no question was made as to the propriety of convicting John Messingham under the indictment on proof of the separate receipt by him. And this point is still further explained in *Regina v. Davey & Gray*, 6 Brit. Cro. Cas. 89. The indictment in this case charged the defendants with jointly receiving twelve turkeys, knowing them to have been stolen. The evidence showed that the turkeys were stolen by a man named Hadden; and Davey stated that he was called up at two o'clock in the night on which the turkeys were stolen by Hadden, who brought the turkeys to him in a sack; that he took them to Salisbury and sold them for Hadden. But the evidence showed that he sold only two and left the other ten with the other defendant, Elizabeth Gray, who resided at Salisbury, and who was proven to have disposed of the turkeys the same day. The jury returned a verdict of guilty against both prison-

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ers for receiving. The verdict was objected to, inasmuch as the indictment charged a joint receiving and the evidence showed separate acts of receiving by each defendant, and the jury were sent back and returned a verdict in this form: "We find that William Davey received on the road between Brook and Salisbury, and Elizabeth Gray at Salisbury." The prisoners were not together. The question before the court was, whether upon this verdict the judgment ought to be reversed in favor of both or either of the prisoners. The court were of opinion that the first receiver, Davey, was properly convicted. And as *Rex v. Messingham* shows that several persons cannot be convicted of distinct felonies which are charged in an indictment as a joint felony, the evidence ought to have been confined to the case of the first receiver, and a verdict of acquittal taken in favor of Gray.

The rule to be deduced from these cases seems to be that when several are charged with jointly receiving stolen goods, to convict all or any two or more of them a joint receipt must be proven.

But in the case of *Rex v. Horthall, Neal, Mole, and Horseman*, 7 Car. & P. 475, the first count of the indictment charged Horthall and Neal with a burglary in the house of Richard Gould, and stealing 200 pounds of bacon and other articles, and the same count went on to charge Mole with receiving 75 pounds, and Horseman with receiving a like quantity. There was also a count charging Mole and Horseman with the substantive felony of jointly receiving the bacon, and two other counts charging Mole and Horseman separately with a separate substantive felony, in each separately receiving a part of the stolen bacon. The burglary of Horthall and Neal was proven; but the evidence of receiving showed that Mole and Horseman had received portions of the stolen bacon on different occasions and quite unconnectedly with each other. The counsel for Mole and Horseman submitted that the count which charged a joint receiving was not proven, and that as distinct felonies had been committed by

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the prisoners, Mole and Horseman, they ought to have been tried separately. The prisoners were all convicted, and the court refused to disturb the verdict.

It seems, then, that from all the authorities on the subject, it may be safely stated that in this case if the money was stolen, and the defendant Smith received it knowing it to have been stolen, he may be convicted although he is charged with jointly receiving it with others when the evidence shows that it was a separate act of receiving on his part.

But it is insisted that Charles Noyes first received it from Hard, the thief, and then delivered to this defendant, and that the receipt by Noyce satisfied the charge in the indictment and the defendant ought to have been acquitted according to the doctrine of *Rex v. Messingham*. But the facts proven do not warrant this conclusion, nor would they justify an instruction to this effect. The evidence of Hard shows that he and Charles Noyes jointly committed the theft, and not Hard alone. It is said that a party engaged in the transaction is a principal thief, not a receiver, (*Roscoe Crim. E. 807,*) and Charles Noyes received the money, not as the fruits of Hard's embezzlement, but as the fruits of his own burglary and larceny. He was equally guilty with Hard in the whole transaction; indeed, he seems to have laid the plan by which the burglary was accomplished. He was one of the original offenders, and for all purposes must be regarded as holding the money as the fruits of his own theft. Then, if the principle is correct, (and I think it is settled beyond dispute,) but one receiving was proven by the evidence, and that was the receiving by the defendant Smith from Noyes, and according to the doctrine laid down in the cases cited he might properly be convicted for that receipt.

III. It is complained that the court below improperly admitted the witness Hard to relate conversations between himself and Charles Noyes prior to the theft, in relation to how the express company might be robbed, and in forming their plans to accomplish the felony; and also a conversation which took place between them the morning after the crime had been committed.

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To convict the defendant Smith under the indictment, it was necessary for the State to prove two things: first, that the money alleged to have been received by Smith was stolen; and, second, that Smith received it knowing it to have been stolen. (Whart. Crim. L. 676.) The act of stealing the property had to be proven, not by anything the defendant Smith had said or done, for so far as the indictment and evidence shows he had nothing to do with the stealing nor any knowledge of it until after it was accomplished. But this fact had to be proven by what was done and said by other parties with whom Smith had nothing to do at the time. The act of stealing, especially when accomplished by more than one person, has several parts. There must be plans laid and arrangements made, and there must be acts done in accordance with these plans and arrangements, and all these parts taken together constitute one act. Then, in proving an act, may you prove all its parts, or are you confined to the proof of its consummation? It is generally sufficient to prove the final consummation, and the law will then presume all the concomitant parts that go to make up the act. Thus, in murder, if the killing be proved, the law will presume it was done in malice; but this presumption would not cut the prosecution off from proving that it was done in malice. Again, if a person is proved to have taken the property of another from his possession without his (the owner's) knowledge or consent, the law will presume that it was taken feloniously—that the taker took it with the intention of converting it to his own use; but the prosecutor will not be prevented from proving this intention by evidence. And so of any of the other concomitants of crime. It may be unnecessary that the prosecution should prove them, but it could hardly be urged as an objection that he does prove them. So in the case at bar. Charles Noyes and the witness Hard commit a felony in the express office of the United States Express Company. Can it do the defendant any harm to prove when and where and how they agreed upon the plan by which this should be accomplished? Was not the plan and arrangements by which the money was taken as much a part

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of the felony as the taking of the money itself? The felony, the stealing of the money mentioned in the indictment, was a substantive fact that the prosecution must prove; and upon what principle is he to be debarred from proving one part of that substantive fact rather than another? But it is urged that the conversations between Hard and Noyce are, so far as this defendant is concerned, irrelevant, and ought not to be admitted. They certainly ought not to be admitted for the purpose of connecting the defendant Smith with the stealing. And if Smith's name had been mentioned, as much at least of the conversation as referred to him ought to have been excluded. But these conversations were competent to prove the stealing—to show how it was planned and how it was accomplished; and in this sense they were not hearsay but a part of the *res gestæ*. If these conversations are to be excluded as hearsay because Smith was not present nor proven to have had any knowledge of them, why may not, on the same principle, the act of stealing be excluded as *res inter alios acta*? Smith was no party to that either, and that would tend just as much to prejudice the minds of the jury against him as the details by which it was accomplished. Both the plan of the theft and its consummation form one transaction, and might be properly admitted. (Roscoe Cr. Ev. 20; 1 Phil. Ev., 191-4; Maryland v. Ridgley, 2 Har. & McH. 120.)

On the cross-examination of Mrs. Van Court, a witness called on the part of the State, the defendant offered to prove that quinine was brought to her house about the time of the robbery of the United States Express Company, to be sent away secretly. The prisoner boarded at her house. This evidence was ruled out. The State had before proven that the defendant said that about the time of the robbery Charles Noyes had come to him and asked him to send some quinine to New York for him, Noyes; that Noyes said he had sent it to Memphis for the purpose of getting it through the Federal lines, and had failed, and the detectives were now on the lookout for the quinine, it being contraband of war, and that he had agreed to send the quinine for Noyes, and when

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Noyes brought the bundle to his room and put it in the trunk he supposed it was the quinine. This evidence of Mrs. Van Court was offered to support the prisoner's statement. There was no error in excluding this evidence. The defendant was entitled to every reasonable hypothesis of the innocence consistent with the evidence, and if it was probable that this state of facts could have existed, the jury were bound to acquit under the instructions of the court. The court instructed them that "in order to convict a defendant upon the evidence of circumstances alone, it is necessary that the circumstances proven shall have relation to, and be consistent with, each other; that they all concur to show that he is guilty of the offence charged against him, and that they all be inconsistent with any other rational conclusion. The inference against a defendant to be drawn from the circumstances proven must be so reasonably and morally certain as to exclude every presumption of his innocence. Under the law then, as thus laid down, if the defendant could even suppose a reasonable theory of his innocence, consistent with the facts proven, the jury were bound to acquit. The defendant was not required to prove his innocence; but if he could even suppose a reasonable theory consistent with the facts proven, the jury were bound to accept it and acquit. The court did, however, permit another witness, McCracken, to prove all about the quinine. So the defendant got the benefit, if there was any benefit in it, of all the evidence that was rejected.

IV: The last complaint is that the jury were misdirected as to the law. The instructions will not be set out in full here or very lengthily noticed, for the reason that the principles involved in them have already been discussed in a former part of this opinion. Instructions numbered 1, 2, and 10, in the series of instructions, and refused by the court, are based upon the idea that there must be a joint receiving by the defendant Smith, and Charles Noyes, and Friend Noyes, as charged in the indictment, otherwise the defendant ought to be acquitted. These instructions were properly refused for reasons given in a former part of this opinion.

The third instruction refused is based upon the idea that

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the defendant, before he could be convicted, must be proven to have received the goods from Charles D. Hard, who is alleged in some of the counts of the indictment to be the person who embezzled the money. This was a fact that it was neither necessary to allege or prove, and the instruction was properly refused. (Rex v. Jervis, C. Car. & P. 166.)

The fourth instruction laid down no rule of law that would aid the jury in coming to a conclusion upon the facts.

The rule intended to be reached by the fifth, sixth, seventh, eighth, and ninth instructions was properly laid down by the court in the second instruction given on its own motion, and it was unnecessary to repeat it.

The eleventh instruction refused was based upon the idea that the principal felon must be named, and was properly refused for the reasons given in a former part of this opinion.

We find no error in the record, and the judgment is affirmed. The other judges concur.

ROBERT STEELE TO USE OF JOHN M. MILROY *et al.*, Respondents, *v.* SILAS W. FARBER, H. C. McPIKE *et al.*, Appellants.

1. *Mortgage — Trust.* — A. conveyed real and other property to B. and other creditors, to secure debts and liabilities, upon condition that if he paid the debts the deed should be void; but if he did not pay the same, then that B. should have power to sell the property at auction, and convey the same, upon such terms as a majority of the grantees might agree upon. The deed did not provide how the proceeds of sale should be disposed of. *Held*, that the deed must be treated as a mortgage, with a power of sale in B., and that the proceeds of sale must be distributed upon the trusts implied in the deed according to the equities of the parties, under the control of a court of equity. *Held also*, that B. had such an interest and title in the property, that, upon a seizure and levy upon the personal property by the sheriff upon an execution against A. in favor of an unsecured creditor, he might make claim for the same, and might sue upon the bond given by the execution creditor, and recover not only for his own interest but also for that of his co-grantees. *Held further*, that upon default of payment, in accordance with the terms of the deed, he might take and hold possession for himself and his co-mortgagors.

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2. *Mortgage—Emblements.*—Where the mortgagee enters upon the land and harvests the crops, thus converting them into personalty, he takes them as profits of the estate, to be accounted for to the mortgagor in the settlement of the debt.
3. *Mortgage—Securities.*—A surety may give to his co-sureties a mortgage to secure them against his liability for contribution.

Appeal from Ralls Circuit Court.

William Penix, on 28th June, 1862, executed to the relators (who are the respondents here) a mortgage with power of sale (filed for record July, 1862), conveying certain real estate and personal property, therein described, to secure debts due from him to some of said mortgagees, and to indemnify certain of them as his sureties. After describing the property, he says "and also the products of my farm, until my debts to the aforesaid persons are satisfied." The deed provides that if the grantor pays his individual indebtedness and saves harmless his co-partners and securities against their said liabilities, the deed to be void; but if "he fails to satisfy said indebtedness," then the said John M. Milroy is authorized to sell at public auction said property to the highest bidder on such terms as a majority of the beneficiaries may agree upon, and to convey all grantor's right, title, &c., to said property.

Defendant Farber, as surviving partner of Johnson & Co., having obtained judgment against Penix in the Louisiana Court of Common Pleas, caused an execution to be issued and put in the hands of sheriff Steele (plaintiff below) July 23, 1863, who, on the 24th, levied on, among other things, three ricks of wheat and two stacks of wheat as the property of Penix, advertised and sold the same August 26, 1863. On the 6th August, 1863, John M. Milroy, one of the relators, claimed the wheat, and trial of the right of property being had, it was found to belong to said Milroy; whereupon Farber, with McPike, the other defendant, as his surety, gave to the sheriff the usual bond of indemnity, and the sheriff sold said property to satisfy the execution.

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This suit was brought on said bond by the sheriff to the use of the beneficiaries claiming damages to the amount of \$700, the alleged value of the property.

The petition set forth that Milroy, one of the relators and acting for them, in writing, verified by affidavit, claimed the property levied on as aforesaid—the judgment in favor of Farber against Penix—the issuing and levy of the execution—trial of the right of property—the finding in favor of Milroy—and then alleges the usual breaches of the bond.

The answer denies the claim by Milroy on behalf of the relators, but says the property was claimed by him in his own right—alleges the wheat levied and sold to be the property of Penix, defendant in the execution, and was subject to seizure and sale under the execution.

The suit was commenced in Pike county and a change of venue taken to Ralls county.

Plaintiffs read in evidence the mortgage or deed of trust from Penix, before mentioned; also an agreement between the relators, dated June 11, 1863, fixing the time and terms on which the property should be sold.

William Penix, the mortgagor, was examined, by whom it was shown that he was living on the farm when the mortgage was executed, and continued to reside on it up to the time of sale; also, that all the property remained in his possession on the farm, except a part of it that he sold after mortgage was made, and such as he consumed in the support of his family; that the wheat was sown in the fall of 1862, on part of the land conveyed, by Penix or by his direction, and he harvested it by direction of Milroy; that he turned over the property (wheat) to Milroy the 20th June, 1863; that the wheat was in stack when the levy was made.

The household furniture was never sold by the trustee, and a horse and some other property were not sold. The debt to Farber & Co. was about \$1,000; Penix also owed other debts, probably amounting to \$1,200 or \$1,500, not secured by mortgage.

Defendants read in evidence transcript of record and pro

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ceedings in a suit of Farber, surviving partner, v. W. Penix, in Pike county, showing judgment for \$1,018.45, in July, 1862, and execution and return. This return shows a levy on, among other things, three ricks of wheat and two small stacks of wheat, and a lot of oats and hay, a part of which—one rick and one small stack of wheat, and a lot of oats and hay—being claimed by Penix under the exemption law, were set aside to him. The return also shows a claim of the property by Milroy as his property, and upon a trial of the right of property the same was found by the verdict of the jury to be in said Milroy.

There was a judgment for plaintiffs for \$520.

Harrison, Campbell & Ewing, for appellants.

I. The mortgage did not pass the title to the products of the farm; for when the instrument was executed the crops were not raised, and could not be pledged or mortgaged. A grant of goods not belonging to the grantor at the time of executing the deed, or not in existence, does not pass the title to the property when acquired. (*Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 Metc. 17; *Pettus v. Kellogg*, 7 Cush. 456; *Head v. Goodwin*, 37 Me. 132; *Gale v. Burnell*, 7 Ad. & Ell. 850, 863; *Mogg v. Baker*, 3 Mees & W. —.)

The grantor must satisfy the grant by some *new act* for the avowed object and with the view of carrying the former grant or disposition into effect after he acquires the property. (See the authorities above cited and *Lum v. Thornton*, 1 Mann., G. & S. 379.)

In *Jones v. Richardson*, *supra*, the mortgagee offered to prove that the property in question, after it was acquired by the mortgagor and before the right of defendant had intervened, (who was an attaching creditor of the mortgagor,) was taken possession of with the other property for the purpose of foreclosing the mortgage; this proof was excluded as irrelevant, the judge (Wilde) who delivered the opinion of the court saying that it did not prove, or tend to prove, any

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act done by the mortgagor after the mortgage was executed, by which he ratified the same as to subsequently acquired property ; and this act must be done with the view to give effect to the former grant and for that *avowed object*.

Even an express stipulation in a lease that the lessor is "to have or hold a lien on the crops raised on the premises until the rent is paid" is merely an *executory* contract, and by it no general or qualified property in the crops is acquired before they are raised and delivered. Such agreement constitutes no mortgage or pledge of the crops ; for when the contract was made they were not raised, and could not be mortgaged or pledged. (Barnard et al. v. Burton et al., 5 Vt. 99.) The cases cited by respondents' counsel (20 Mo. 508 ; 31 Mo. 445) do not apply here.

II. The respondents acquired no right to the products of the farm as mortgagees of the land. So long as the mortgagor continues in possession by permission of the mortgagee, he is entitled to take the rents and profits in his own right, without rendering any account whatsoever therefor to the mortgagee. (2 Sto. Eq., § 1017 ; 4 Kent Com. 161.)

The mortgagee has no right to the emblements unless he takes possession of the estate mortgaged ; and when severed by the mortgagor, they become his property absolutely and without any liability to account for them. (4 Kent Com. 161 ; Toby v. Reed, 9 Conn. 224-5, and authorities there cited.)

The modern doctrine is well established, that a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was given ; and until the mortgagee enters for breach of condition, or until foreclosure of the mortgage, the mortgagor is the owner of the mortgaged estate, and has a right to lease, sell, and in every respect to deal with it as owned, so long as he is permitted to remain in possession. (Kennett v. Plummer, 28 Mo. 145-6, and authorities there cited.)

III. The instrument is void as conveying the property to the use of the mortgagor, and as being without considera-

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tion. This appears, among others, from this clause, namely: "Whereas I am equally bound with the said James H. Huf-ford, Wm. W. Waddell, James Bryson, and John B. Hender-son, to the following persons," and then follow the names of the creditors. These creditors are not beneficiaries in the mortgage, but the conveyance is to the co-obligors of the mortgagor.

J. B. Henderson, for respondents.

I. The clause in the deed of Penix for the benefit of his creditors in the following words, to wit, "also the products of my farm, until my debts to the aforesaid persons are satisfied," is sufficient to pass to the grantees such crops as might be grown after execution of the mortgage. A crop hereafter to be grown, or materials and stock in business to be subse-quently acquired, may be mortgaged; especially is this the case when the lands on which the crops are to be grown, or the buildings, factories or other premises in which the mate-rials and stock are to be used in business, are at the same time mortgaged. (1 Hill. R. P. 4; Evans v. Meinken, 8 Gill. & J. 9; Hughes & Graves, id. 317; Gale v. Burnell, 7 Ad. & Ell. 850; 2 Hill. R. P. 336-9, 2d ed.; Page et al., v. Gardner, 20 Mo. 507; Mitchell v. Winslow et als., 2 Sto. 631; Coote on Mort. 101-2; 1 Pow. on Mort. 17-8.)

II. Whether the clause in the deed conveying the products of the farm was sufficient to pass the crops grown in the fu-ture, or not; it is insisted that the mortgage having become forfeited, the possession of the mortgaged premises having been taken by the mortgagee before severance, and the grow-ing crops having been harvested by him, he is clearly enti-tled to hold such crops as a security for the mortgaged debt against any claim originating subsequent to the date of the mortgage. (1 Pow. Mort., 6th Eng. ed. 155; 4 Kent Com., 6th ed. 155; Cooke, Mort., Law Lib. ed. 333; 1 Hill. Mort. 2d ed. 161; Walton v. Withington, 9 Mo. 545; Anthony v. Rogers, 17 Mo. 398; 20 Mo. 281; Walcop v. Griswold, 10 Mo. 229; Meyer v. Campbell, 12 Mo. 615; McIlvaine v. Har-

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ris, 20 Mo. 457; Pratte et al. v. Coffman, 27 Mo. 424; Lane v. King, 8 Wend. 584; Hodgson v. Gascoigne, 5 B. & A.; Toby v. Reed, 9 Conn. 216; Gillett v. Balcour, 6 Barb., S. C.; Crews v. Pendleton, 1 Leigh, Va. 294; 2 Den.; 3 John. 216; 3 N. H. 503; 3 Watts, 394; 7 Watts, 378; Hill. R. P. 32; 4 Kent Com. 518-9; 1 Greenl. Ev. 352.)

First—When a deed of conveyance absolute is executed, a crop growing on the soil is considered a part of the freehold, and passes with the land. (Hill. R. P. 32; 1 Leigh, Va. 294; 3 Johns. 216; 3 N. H. 503; 3 Watts, 394; 7 id. 378; 4 Kent Com. 518-9; 1 Greenl. Ev. 352; McIlvaine v. Harris, 20 Mo. 457; Pratte et al. v. Coffman's Exec'r, 27 Mo. 424.)

Secondly—The rights of a mortgagee of lands after forfeiture against the mortgagor, and those claiming under him, are the same as those of a grantee in an absolute deed of conveyance. (12 Mo. 615; 10 Mo. 229; 8 Mo. 365; 8 Mo. 615; 12 Mo. 117; 17 Mo. 398; 20 Mo. 281; 12 Mo. 117.)

Thirdly—Both the grantee in an absolute deed and a mortgagee after forfeiture are entitled to the growing crops, because their title to the premises is paramount; and being entitled to the land, they are entitled to the crops standing on it as a part of the land. (See authorities above cited.)

HOLMES, Judge, delivered the opinion of the court.

After some hesitation as to whether this instrument (which is very inartificially drawn) be properly a mortgage, a deed of trust, or a partial assignment for the benefit of creditors, we have come to the conclusion that it must be considered as a mortgage containing a power to sell, and creating a trust in the proceeds of the sale. It conveys the property, consisting of real and personal estate, to the sixteen persons named as grantees and parties of the second part, and it is conditioned for the payment of certain debts owed by the grantor to some of these parties, and for indemnity against liabilities severally incurred by others of them on account of the grantor, and the persons so named as grantees are the

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same persons who are thus severally secured. It gives to John M. Milroy, one of their number, a power to sell the property conveyed in case of default made in such payment or indemnification. The whole title or estate is not vested in him, but only a joint interest as tenant in common or part owner with the rest; but a power may be a mere naked collateral power, not annexed to any estate, or a power coupled with an interest and estate; and it may be given to any one of the parties having an interest or estate in the property, or even to a stranger who takes no title or estate in the property conveyed. (6 Crui. Dig., tit. Power, A. 1; Hard. 415; 4 Crui. Dig., Greenl. 133-7*; 4 Kent Com., 316-22*; 1 Sug. Vend. 522* n. 1, 523* n. 2; Carson v. Blakey, 6 Mo. 273.) In either case, the execution of the power by a sale and conveyance of the property to the purchaser devests the legal title or fee out of the persons to whom it has passed, and vests it in the purchaser under the power; and the person who is entrusted with the execution of such a power becomes a trustee of the proceeds of the sale for application and distribution in accordance with the trusts of the instrument, express or implied, subject to the jurisdiction and control of a court of equity in the matter of trusts. (Braman v. Stiles, 2 Pick. 460; Dabney v. Manning, 3 Ohio, 321; Peter v. Beverly, 10 Pet. 532; Eaton v. Whiting, 3 Pick. 484; Kinsley v. Ames, 2 Metc. 29; 1 Crui. Dig., tit. XV., ch. 1, § 44, n. 1, & ch. 6, § 1, n. 1, by Greenl.; 2 Sto. Eq. Jur., § 1031, 1196-7.)

This mortgage does not in any express words give to John M. Milroy any right to take possession of the property conveyed upon default made, nor does it declare in terms what he shall do with the proceeds of the sale when received; but it may be gathered and implied from the character and tenor of the whole instrument, that he was to take possession for the purpose of a sale, deliver the property sold to the purchasers and receive the purchase money, and that, when received, it is to be applied to the payment of the debts and liabilities thereon secured to be paid, or indemnified, to the

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persons named as mortgagees and creditors. All this would seem to be necessarily implied in the grant of a power to sell and convey the property for the purposes of the deed, and a trust arises by operation of law in respect of the proceeds, either for the use of the grantor, or for the use and benefit of the persons named as beneficiaries, such intention being sufficiently expressed and declared in the instrument. We think this mortgage to be sufficiently clear and definite as to the object and purpose of the conveyance, and as to the beneficiaries, and as to the appropriation to be made of the funds to enable a court of equity to enforce an execution of the power and a performance of the trust.

John M. Milroy, having thus a right to take possession of the property, when default was made, for the purpose of selling it, in pursuance of the power given for the benefit of the mortgagees when the whole property was turned over to him by the mortgagor for that purpose, acquired a lawful possession of the property on behalf of himself and the other mortgagees. The proof is clear that the whole property, real and personal, was delivered up to him by the mortgagor on the 20th day of June, 1863, to be advertised and sold under the mortgage. The property was advertised for sale, but the mortgagor was suffered to remain in his occupancy of the premises by the consent of Milroy, and, as he himself says, at the mercy of his creditors and the purchasers. At this time the wheat in question was a growing crop on the farm, as yet unsevered. It was harvested under the direction of Milroy, stacked on the farm, and left in the immediate charge of the mortgagor; but this did not make the stacks of wheat subject to a levy and sale under an execution in favor of a creditor of the mortgagor. The bare possession of a chattel by the mortgagor with the consent or permission of the mortgagee, and determinable at his will, does not make it subject to such levy. (*King v. Bailey*, 8 Mo. 332.) The growing crops passed to the mortgagees by virtue of the mortgage of the land on which they were growing. A growing crop is an interest in land; it is a part of the freehold, and it passes

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by a deed conveying the land without more. (*McIlvaine v. Harris*, 20 Mo. 458; *Pratte v. Coffman*, 27 Mo. 424; 1 Crui. Dig., Greenl. 59, s. n. 1.) The doctrine of emblements, or of contracts for the sale of growing crops, as such, before severance, has no application in this case ; the matter is governed here by the contract of the parties as expressed in the conveyance. The mortgagees, or rather the trustee of the power on their behalf, had a right to enter and take possession of the farm and of whatever belonged to it as a part of the realty ; and so of the growing crops, conveyed for the security of the debts and liabilities. When the crops are harvested by the mortgagee in possession, they are to be applied to the payment of debts secured, and they go thus to the benefit of the mortgagor. (*Doe v. Giles*, 5 Bingh. 427; *Creins v. Pendleton*, 1 Leigh, 297; *Pested v. Colvin*, 3 J. R. 216; *Wilkins v. Vashbinden*, 7 Watts, 378; *Evans v. Meinken*, 8 Gill & J. 39; *Walton v. Withington*, 9 Mo. 549.) Even where an execution is levied on a growing crop as a part of the realty subject to execution, in which case a sale gives the purchaser a right to enter and harvest the crop as against the judgment debtor, a prior mortgage of the land takes precedence of the execution and carries both land and crop. (*Shepherd v. Philbrick*, 2 Den. 174.) When the mortgagee takes possession and cuts the growing crops, thus converting them into personality, he takes them as profits of the estate to be accounted for to the mortgagor in settlement of the debt and interest ; but when the mortgagor remains in possession, and harvests the crops, he takes them for his own use and benefit as consumable profits of the farm, absolutely as his own. (*Toby v. Reed*, 9 Conn. 216; 2 Sto. Eq. § 1017.)

There can be no doubt that this crop of wheat passed to the mortgagees with the land by virtue of the conveyance, without reference to the clause concerning the future "products" of the farm, when a virtual entry was made, and possession taken of the premises, by or on behalf of the mortgagees. It is equally clear that Milroy had the right and

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power to enter and take possession of the property on behalf of himself and the others as mortgagees. And when the growing crop was harvested by him and thus became converted into personal estate, he had the same right to the possession and the same title as before ; and it matters not, as against these defendants, or the execution creditor, whether the whole title was vested in him, or a joint interest as tenant in common or part owner with the other mortgagees, or a mere special property and right of possession. He had such an interest, title, and right of possession, as was sufficient to enable him to claim and hold the property against the mortgagor, and the execution creditor, for all the purposes of this case. It was clearly not the property of the mortgagor ; nor was it subject to levy and sale as such under an execution against him. This being so, it becomes immaterial and altogether unnecessary to consider whether or not the clause, "*and also the products of my farm until my debts to the aforesaid persons are satisfied,*" would be effectual either in law or equity to convey "products" which were not in existence as such at the date of the mortgage, or products which had been severed and converted into personalty by the mortgagor while he remained in possession of the premises.

The first instruction given for the plaintiffs, taken by itself, would be open to serious objection ; but, when considered in reference to the evidence before the jury, it may be sustained as substantially correct. It omitted to include among the facts supposed in it the very important circumstances, that the mortgagee had entered and taken possession of the premises while the crop was yet standing on the land, and that it was harvested under his direction and for himself; but these facts were proved, and there was no evidence whatever that the mortgagor had harvested the crop for himself while he remained in possession as mortgagor. So far as this instruction predicated a right to recover solely upon the clause relating to "products of the farm," whether "harvested by himself or the relators," we think it was superfluous, if not also erroneous ; but it was followed by other instructions

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for the plaintiffs which laid down the law correctly in the case made, and we do not think the error of sufficient importance to call for a reversal of the judgment on that ground alone.

For similar reasons the second, third and fourth instructions, which were refused for the defendants, on the same subject, may be considered as rightly enough refused. There was no sufficient basis in the evidence for such instructions, and they were wholly immaterial to the issue on the case made.

It is contended on behalf of the defendants that the mortgage deed was void on its face, for the reason that it made a reservation to the use of the grantor himself, and covered up the property beyond the reach of creditors for his own use and benefit. This objection is founded upon a clause in the deed which reads thus : "and whereas I am equally bound with" (four of the mortgagees named) "to the following persons," named as holders of notes for specified amounts. It is by no means clear in what manner the grantor and these four grantees were bound or liable on these notes ; but it would seem to be a fair construction, that it means to say they were bound as co-sureties, or at least as endorsers. The four persons named as mortgagees are indemnified against liability on his account on these notes, that is all. There can be no pretence that the holders of these notes are secured as beneficiaries in the deed. It is not stated who were the makers of the notes, but the next clause goes on to speak "also" of his "individual debts"; from which it may be inferred that he was not the maker of these notes. The language imports a joint liability as co-sureties. In such case, either of them might be compelled to pay the whole, and there would then be a right to a contribution from the others. As an indemnification for such liability the mortgage would be valid. If the other persons became liable to him for a contribution, that indebtedness would be subject to garnishment at the suit of his creditors unaffected by the mortgage; and as to any liability on his part to them, it is

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not apparent how any question of fraud can arise on the face of the instrument, or otherwise than as a matter of fact *aliunde* upon evidence tending to show that the property conveyed was largely more than enough to secure the whole indebtedness provided for in the mortgage, or fraud in fact in the making of the deed; and this would be a matter of fact for a jury. We do not see that there is any fraud in law, in this respect, appearing on the face of the instrument.

It is further objected that John M. Milroy alone can maintain a suit on this bond. The petition alleges that he claimed the property before the sheriff for himself and the other mortgagees. The answer denies this. The return of the sheriff is, that John M. Milroy claimed the property, in writing, as his own. The claim itself does not appear in the record, nor is there any evidence on this point. The statute concerning executions (R. C. 1855, p. 743) provides that when any person shall in writing, verified by affidavit, claim the property levied on, a jury may be summoned to try the right of property (sec. 26), but, notwithstanding the verdict may be for the claimant, the officer must proceed to sell if the plaintiff will tender him a bond of indemnity (sec. 30). The claimant may sue on the bond in the name of the sheriff to his own use (sec. 31), and the execution of the bond is a bar to his right of action against the officer (sec. 32). Those who do not make such claim in writing under the act are not barred of their actions against the sheriff. (Bradley v. Holiday, 28 Mo. 150.) The bond is conditioned, not only to pay and satisfy any person "claiming title to such property"—that is, any person who makes claim in writing, under the act, for all damages which he may sustain in consequence of the seizure and sale—but also, and chiefly, to indemnify the officer against all damages which he may sustain in consequence of the seizure and sale of the property. No person is bound to appear and claim the property in writing before the sheriff; nor is any one who does not so claim, barred of his action against the officer. * The bond is no protection to the officer against persons who make no claim; it protects

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him only against the claimant for whose benefit as well as his own the bond is given. The act evidently contemplated that the officer may be sued in trespass by other persons than the claimant in writing; and the bond when given by the plaintiff, upon any claim, is therefore to be conditioned to indemnify him against all damages which he may sustain by reason of such suits. In such case, he will sue in his own name and to his own use; and the person who has made claim in writing, under the act, may maintain an action on the bond in the name of the officer to his own use (sec. 31); but persons who have never made claim in writing in this manner, being left to their actions against the officer, have no right to sue upon the bond at all. It is not given for their benefit. If it were expressed in terms which would give it force for their benefit as a common law bond, independent of the statute, it is very possible they might sue upon it. (*Watson v. Frank*, 21 Mo. 108.) The bond being given to the sheriff in his name only, it is only by force of the statute that an actual claimant can sue upon it in his name. It follows that this suit should have been brought to the use of John M. Milroy alone. He, only, made claim in writing before the sheriff; and, as we have seen, he had such a right and title to the property as would have enabled him to maintain an action against the sheriff if a bond had not been given, and now enables him to sue upon the bond in the name of the officer to his own use. He recovers the property, or the value of it money, not in his individual right only, but in his character of trustee of the power to sell under the mortgage, and the trust fund in his hands must be appropriated and applied as the mortgage directs, under the control of a court of equity, in which the other mortgagees may find an ample remedy in case their rights should not be respected.

There could be no such thing as a separate action for each one of those mortgagees against the sheriff in respect of his particular interest in the property, nor can they be treated altogether as one claimant, acting in the name of John M.

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Milroy. It does not appear that the claim was made in that manner. Milroy had taken possession of the property under his power for the purpose of a sale and an execution of the trust. He alone could properly make the claim before the sheriff, and he only is entitled to sue upon this bond.

The sixth instruction asked by defendants was correct in so far as it told the jury that the verdict should be for the defendants as to all the plaintiffs but John M. Milroy, but it was erroneous in declaring that Milroy could recover only for his individual share.

The seventh instruction for defendants was correct enough in itself, and might have been given if the state of the evidence had been such as to make it relevant or important. As it was, there was no substantial error in refusing it.

The eighth instruction asked by defendants was rightly refused. (*Ashby v. Winston et als.*, 34 Mo. 311.)

This matter of the parties plaintiff appears to be purely a technical difficulty. We do not see that it is in any way important to the rights of the defendants here, or that it would make any difference with their defence, if a new trial were granted. And this court having power by the statute to reverse or affirm on the whole record, and to give such judgment here as shall be agreeable to law (R. C. 1855, p. 1301, § 35), we think justice would best be accomplished by affirming the judgment as to Robert Steele to the use of John M. Milroy, and reversing and dismissing the case as to the other plaintiffs, who are no proper parties to this action. Judgment will be entered accordingly.

Judge Wagner concurs; Judge Lovelace absent.



JOHN LOLER, Appellant, *v.* JOHN COOL *et al.*, Respondents.

1. *Practice—Pleading.*—An answer to a petition setting forth a contract and stating the particulars in which defendant failed to keep it, averring that the defendant had kept its terms and performed its conditions, although informal in not specifically denying the several allegations of the petition, presents issues to be tried, and does not admit the breaches alleged. Exceptions to such answer should be made before trial.

Loler v. Cool et al.

Appeal from St. Louis Circuit Court.

Goff, for appellant.

Shreve and Colvin, for respondents.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff sued for damages for the failure of the defendants to perform the stipulations contained in a written lease, requiring the lessee Cool to make certain improvements on the farm during the period of the lease, which were to be left on the premises at the end of the term. The answer admitted the stipulations, and averred a performance of them on the part of the lessee, and set up a counter-claim, to which there was a reply. There was a trial before a jury, and a verdict was given for the defendants.

The instructions asked for by the plaintiff were refused; but the court proceeded to give an instruction on his behalf as follows: "The jury are instructed that the terms of the lease are stated in the petition and are admitted by the answer, and if the jury find from the evidence that the defendants failed to comply with their contract as therein stated, they will find for the plaintiff, and assess his damages at such sum as they find he has been damaged by said failure." This instruction would seem to have presented the case to the jury as fairly for the plaintiff as he could reasonably expect, and it substantially placed the whole issue before the jury.

The first instruction, which was refused for the plaintiff, required the court to tell the jury that the answer contained no sufficient denial of the specific allegations of breaches of contract as set forth in the petition, and that they therefore stood admitted, and required no proof. The petition stated the several particulars in which the defendant had failed to keep and perform the contract. The answer averred that they "had in all respects faithfully kept its terms and complied with its conditions, except in the payment of the taxes in the sum of thirty-one dollars." This answer was informal

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and defective in not specifically denying the several allegations of the petition as contemplated by the statute. But the plaintiff had taken no exception to it, either by demurrer or motion to strike out any part of it, and as he chose to go to go to trial upon it as it stood, his instruction was properly enough refused. The answer was sufficient to notify the plaintiff that the breaches alleged were not intended to be admitted, but were distinctly put in issue. These questions of pleading should be settled in the court below before the parties go to trial. There was no material error in the refusal of the other instructions.

Some objections were made to the admission of testimony, without any distinct exceptions being taken, which do not appear to have been at all material to the merits of the controversy.

The judgment will be affirmed. Judge Wagner concurs; Judge Lovelace absent.

STATE OF MISSOURI *ex rel.* FRANCIS R. LONG, Relator, *v.*
ALONZO THOMPSON, Auditor of State, Respondent.

1. *Revenue—Union Military Fund.*—A collector who has overpaid the amount due the Union Military fund, cannot require the Auditor to issue a warrant for his reimbursement payable out of any money in the State treasury. By law all warrants must be drawn payable out of a specific fund.—R. C. 1855, p. 1540 § 84.

Petition for Mandamus.

J. H. Moss, for relator.

I. The State Auditor is a ministerial officer, and has no discretion in the performance of a ministerial duty fixed by law. (13 Barb. 86; *People ex rel. Stewart v. Newell.*)

II. The Auditor is required to audit and adjust all claims against the State, and when so audited and adjusted to draw a proper warrant upon the Treasurer for the payment of the same. (R. C. 1855, p. 1540, § 4.)

III. The amount allowed on the delinquent list to the

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collectors of the State revenue in the several counties shall be allowed as credits to said collectors in the settlement of their accounts with the State Auditor, and when so allowed shall be paid out of the State treasury. (Acts Adj. Sess. 1863, p. 80, §§ 37-8, & p. 82, § 55; Acts 1863, p. 28, §§ 11 & 13.)

IV. The military tax levied in the several counties for the benefit of the Union military fund is but a part of the State revenue, the collection of which is secured by the same bond given for the collection of the general revenue, and is by law placed on the same footing and governed in all particulars by the same rules and regulations as prevail in the collection of the balance of the State revenue. (Acts 1863, p. 28, §§ 11 & 18.)

V. The law provides that the amounts allowed to the collectors of the State revenue in the several counties, upon their delinquent list, shall be paid out of "the State treasury." Such is the broad language of the law without restriction or limitation, and hence the warrant in this case should have been drawn payable out of any money in the State treasury. (Acts Adj. Sess. 1863, p. 82, § 55.)

Krum & Decker, for respondent.

The Auditor is vested with a *quasi* judicial power in determining whether a debt exists against the State, and is vested by law with the duty to audit, settle, and adjust all claims, and the court ought not to interfere with such auditing, adjusting, and settling. This is not a case where the Auditor refuses to act, but he is simply charged with an error of judgment. (7 Mo. 354; 21 Mo. 552-3.)

WAGNER, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* filed by the relator against the State Auditor, asking that the latter may be compelled to draw a warrant in his favor on the Treasurer of the State for the sum of \$4,669.69 out of any money in the State treasury.

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There is some difference in regard to the facts as stated in the relator's petition and the return made to the writ by the respondent, but as the question comes up on a demurrer to the return, the matters and things stated therein will be taken to be true. From this it appears that the relator was collector of the revenue for Clay county for the year 1864, and as such collector stood charged upon the revenue books of the State with the sum of \$10,617.04 of the revenue tax, due to the Revenue fund; that he had made payment into the Revenue fund for taxes of the year 1863, under § 562, R. C. 1855, p. 1347. When making final settlement for the taxes of 1864, he was entitled to receive the credits provided for in § 57, R. C. 1855, p. 1348.

The respondent on these certificates audited, settled, and adjusted his account (R. C. 1855, p. 1542, § 1) in connection with the relief act of 1865, (Laws of Mo. 1865, p. 111,) and found the sum of \$467.28 to be due to the relator for taxes which had been overpaid by him into the Revenue fund. Thereupon he drew his warrant in his favor for the said sum of \$467.28 upon the Revenue fund, which warrant was paid by the State Treasurer.

It appears that the relator also stood charged on the Auditor's books with the sum of \$25,169.95 of commutation tax and military tax due to the Union military fund for the year 1864, which was payable into said Union military fund, (Sess. Acts 1863, p. 28, §§ 10, 11, 12,) an entirely separate and distinct fund. He had theretofore made payments into the Union military fund for the year 1863, in excess of dues in the sum of \$1,622.39, and on the 26th of December, 1864, for the military and commutation tax of 1864, he paid the sum of \$11,034.13 into the same fund. In a settlement with respondent as Auditor, it was ascertained after giving him credit for all proper and legal deductions, that he had overpaid the amount due from him on account of the commutation and military tax in the sum of \$4,669.69, and that this excess or overpayment had been paid by him into the Union military fund. For this excess of \$4,669.69 the respondent

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drew his warrant in favor of the relator on the Union military fund; the Treasurer refused to pay said warrant, and made the following endorsement thereon:

"Payment of the within declined for the reason that the fund out of which it is required that the same should be paid is appropriated and set apart for the sole and only purpose of redeeming Union military bonds until they are all redeemed. See State ex rel. Long v. Bishop. Wm. BISHOP,

Treasurer."

In the case of the State ex rel. Long v. Bishop, this court decided that the Union military fund could not be diverted from the object for which it was created and applied to other purposes; and that the Legislature in the creation of the fund had provided the means for its assessment and collection, and that payment therefor should be made out of another and different fund. But that has no particular bearing on the question here involved. By law every warrant must be drawn on a specific fund, (2 R. C. 1855, p. 1540, § 4,) and accordingly the warrant for \$467.28 was drawn on the Revenue fund because a general appropriation exists to refund in case of excess of payment as provided in section 57. (2 R. C. p. 1348.) But this only applies to the general revenue, and it was surely never intended that where money is deposited to the credit of the Union military fund by mistake or in excess of what is legally due, that it should be retained and appropriated to that fund, and that the general revenue should be required to bear the burden and remunerate the person legally entitled to repayment. The Legislature has not designated or appropriated any fund to meet such an exigency, and the Auditor was not authorized to draw a warrant in accordance with the demand of the relator.

The *mandamus* is refused. Judge Holmes concurs; Judge Lovelace absent.

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EUGENE JACCARD, AUGUSTUS MERMOD, AND D. CONSTANT JACCARD, Respondents, *v.* WILLIAM C. ANDERSON, Appellant.

1. *Note—Waiver of Demand and Protest.*—A waiver of presentment and demand of payment of a negotiable note would imply and include a waiver of protest and of notice of non-payment, but a waiver of notice only would not be a waiver of demand. A "waiver of protest" would imply a waiver of presentment, demand, and notice. The waiver is a matter between the holder of the note and the endorser to be charged, and the agreement must be made between them.
2. *Evidence—Hearsay.*—The testimony of a deceased witness at a former trial of a case is admissible in evidence if the same issues are presented, and his testimony was directed to the issues, thus giving an opportunity for cross-examination.
3. *Practice—Instructions.*—Where all the facts in evidence do not prove, nor tend to prove, the issue, it is the duty of the court so to instruct the jury as a matter of law.

Appeal from St. Louis Court of Common Pleas.

H. S. Lipscomb with A. M. Gardner, and Lackland, Cline & Jamison, for appellant.

I. An issue in pleading can be made only by the averment of a fact by the plaintiff and the denial thereof by the defendant. The testimony of witness King must have been taken on an issue thus formed, to be admissible after his death on the second trial below. The words "that said note was not protested at defendant's instance and request, he waiving protest," do not constitute an averment of demand or excuse for failure to demand payment of the maker. (32 Mo. 188, this case.) There was then, on the first trial of this cause, no averment of demand or excuse for failure to demand payment of the maker. Before the second trial below, King (the witness) died. What he said in the first trial on this issue, not then made by the pleadings, was erroneously admitted on the second trial. (Melvin v. Whitney, 7 Pick. 79; Bull, N. P., 242; Arnold v. Arnold, 17 Pick. 7; 1 Phil. Ev. 393, n.; 1 Greenl. Ev. 528.)

II. To constitute a waiver of demand and notice, there must be an agreement between plaintiffs and defendant.

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What defendant may have said to a third party, not the agent of plaintiffs, is no waiver. (Chit. Bills, 565.) The waiver claimed must be the clear import of the words used by the defendant, and those words should have been spoken to plaintiffs or their agent. (Sto. Bills, 820; Lane v. Savrart, 2 Appleton, 98; 4 Mass. 347; 17 Pick. 835; 11 Wend. 634.)

If the evidence of witness King is to be considered, he distinctly states that defendant did not waive demand and notice.

Garesché and Mead, for respondents.

I. King's testimony was properly read. (Greenl. Ev. § 167 & 163.)

II. The waiver of protest need not be in writing. (Sto. Prom. N. § 279.)

III. The court in its refusal and grant of instructions committed no error for which the court will reverse. Those asked by the defendant were either embodied in those given by the court, or are based upon a hypothesis of fact negatived by the decision. That the court did not err where the instructions refused are embodied in others given; that there is no error, see Williams v. Van Meter, 8 Mo. 339; Master v. Fanning, 9 Mo. 314; Patterson v. McClannahan, 13 Mo. 510; Hurst v. Salomon, 13 Mo. 82; Darby v. Charless, 13 Mo. 465; Huntsman v. Rutherford, 13 Mo. 465; Pond v. Wyman, 15 Mo. 181; Gamache v. Piquinot, 7 Mo. 325; Young v. White, 18 Mo. 98; Carroll v. Paul's Exec'r, 19 Mo. 103.

Where instructions are negative to or unsupported by the facts they should be refused. (Patterson v. McClannahan, 13 Mo. 507; Hasse v. Lemp, 26 Mo. 894; Rogers v. McCune, 19 Mo. 568-9; Harrison v. Cachelin, 27 Mo. 26.)

IV. The defendant is liable. Where the necessary steps to fix an endorser are prevented by some act of the latter which puts the holder off his guard, the holder is excused. And herein of King's visit to the plaintiff, at defendants' instance, to see if the holder would renew and save the note from dishonor. (Sto. Prom. N. §§ 271, 272; Sto. Bills Ex. § 317.)

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In mercantile as well as legal language, the word "protest," used in connection with a promissory note endorsed as the defendant used it, is understood to mean the taking of such steps as by law are required to charge an endorser—that is, demand and notice. (*Coddington v. Davis*, 3 Den. 25; *id. S. C.* 610.)

Where the endorser of a note wrote, "you need not protest T. R. & Co.'s note," &c., and "I will waive the necessity of protest thereof," held sufficient as a valid waiver of demand and notice. (*Cook v. Litchfield*, 5 Sanf., N. Y. 341; 10 Barr. Penn. 103; *Bruce v. Little*, 13 Barb. 167; *Spencer v. Harvey*, 17 Wend. 491; *Gilbert v. Davis*, 3 Metc. 496-7; *Glasgow v. Pratte*, 8 Mo. 336; *Day v. Ridgway et al.* 17 Penn. 30; *Boyd v. Cleveland*, 4 Pick. 526; *Sigerson v. Matthews*, 20 How. 499; *Nowell v. Nowell*, 8 Me. 220; *Dankwater v. Libbetts*, 17 Me. 16; *Amoskeag Bk. v. Moore*, 37 N. H. 543; *Russell v. Conkhite*, 32 Barb., N. Y. 282.)

V. The foregoing decisions prove that what amounts to a waiver is a question of fact, not of law; and on this, see *Union Bk. v. Magruder*, 7 Pet. 290. If, therefore, this be a question of fact, there is nothing in the record to justify the reversal of the judgment, as this court never reviews the facts to see if they justify the verdict. (*Papin v. Allen*, 33 Mo. 260; *McCullough v. McCullough*, 31 Mo. 226.)

It is also submitted on the above authorities, that it is certain that a holder, at the instance of the endorser, on the day of the maturity of a note, authorized to make arrangements to save it from dishonor and to renew it if possible, approaches the holder and persuades him that if the note be withdrawn, and not protested, the endorser and himself will arrange for its payment, is first a waiver of demand and notice, and as such binds the endorser.

HOLMES, Judge, delivered the opinion of the court.

On a former occasion this case was reversed in this court, upon a defective petition, and was remanded with leave to amend. • It then contained an averment that "at defendant's

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instance and request the note was not protested, he waiving protest." On the question whether this was in law a waiver of demand, the court expressed no opinion; but it was said that the question of pleading was distinct from the question of the effect of evidence bearing upon a waiver of protest, and that there must be an averment of a demand, or of facts which could excuse or be equivalent to it, in order to show the defendant's liability. The case now comes up again, after another trial in the court below upon an amended petition. The averment is that "at maturity of said note, to-wit, on the 19th of April, 1857, payment was not demanded, notice given, or the note protested; defendant waived a demand on Washington King, the maker of said note, for the payment thereof, and also notice to him, said defendant, of said demand and non-payment thereof." It is not expressly stated here that the waiver was made to the holders of the note, or by an agreement of the defendant with them; but inasmuch as nothing less than something of that kind could amount to a waiver of demand and notice, we are inclined to think the averment that the defendant "waived a demand," may be understood as sufficiently alleging that such waiver was made in some manner or by some agreement between the defendant and the holders of the note, and that evidence of such an agreement or waiver would be admissible under that averment. A waiver of demand would imply and include a waiver of protest and notice, but a waiver of notice only would not be a waiver of demand also. (Barker v. Shepard, 11 Wend. 629.) There is no absolute necessity for a protest of a note or an inland bill of exchange (Sto. Notes, § 297); but as to a *protest* in such cases, the better opinion would seem to be that an agreement for a waiver of protest alone would fairly imply and import a waiver of demand and notice. (Coddington v. Davis, 3 Den. 16; 1 Pars. Bills, 471, 579.)

On the last trial the plaintiff offered to read in evidence the testimony of Washington King, the maker of the note, as preserved in the bill of exceptions, which was filed on the former trial of the cause (it being admitted that the witness

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was since deceased); to the admission of which the defendant excepted, for the reasons that, first, the issues now made by the amended pleadings were different from what they were at the former trial; and, second, that the testimony offered did not even purport to be all the witness stated on the former trial. There is no objection to the competency of this kind of evidence when proved to be the substance of the testimony which the deceased witness gave on the former occasion. Nor was it objected that the testimony contained in the bill of exceptions was not proved by a witness to be the testimony, or the substance of the testimony, which was given on the former trial. These objections appear to have been waived; at any rate, no objection appearing to have been made, and no exception having been taken on these grounds, they will be taken here as having been waived. We have only to consider, then, whether the objections which were made were well taken. And first, as to the issues being the same. As we have seen, the averment of the former petition amounted to a substantial allegation of a waiver of a demand and notice, and such waiver was one of the issues of fact on the former trial. The testimony of King appears to have been directed to this issue. The averment of this petition, though made in different words, amounted essentially to the same thing. It raises an issue of fact upon the question of a waiver of a demand and notice.

An issue upon a common or free fishery in one case, and upon a several fishery in another, and an issue upon the stealing of a buggy and upon the stealing of a mule, has been held to be different. (*Melvin v. Whiting*, 7 Pick. 79; *Davis v. Steele*, 17 Ala. 354.) The principle upon which the distinction turns is the right of cross-examination, and where the issues are so nearly the same that it is apparent that there was an opportunity to cross-examine the witness as to the same matter in both cases, the issue will be considered as sufficiently identical. (1 *Greenl. Ev.* § 164.) We think the issues here were substantially the same.

As to the other objection, it is sufficient if the statement

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embrace the whole substance of what was said on the particular subject which the witness was called to prove ; they need not contain what was said upon other subjects or upon other issues in the cause. The rule has reference, again, to the right of cross-examination, and it requires that the substance of all that was said upon the particular subject, both on the examination in chief and on cross-examination, should be stated. (1 Greenl. Ev. § 165 ; Davis v. State, 17 Ala. 354.) Justice to both parties would seem to require this much. It is to be presumed that the bill of exceptions contained all the testimony of the witness in chief and on cross-examination which the parties or their counsel deemed material to the issue, or necessary to be saved in a bill of exceptions. On the face of the testimony offered it appears to have been all that was given or deemed important on the former trial ; and it does not appear by the bill of exceptions taken in this last trial that any part of the testimony was omitted before. One of the defendant's counsel testified that he assisted in preparing the former bill of exceptions, and that he " thought it contained in substance the testimony of King at the trial, though not all he may have said." We think it sufficiently appears that the substance of the whole testimony was contained in the bill of exceptions that was offered in evidence.

The main questions involved in the instructions are : first, on the part of the defendant, whether there was any evidence which was competent to go to the jury on the issue made upon a waiver of demand and notice ; and second, on the part of the plaintiffs, whether the first and third instructions which were given for the plaintiffs were correctly given, to the effect that if the defendant, upon being advised by the maker of his inability to meet the note at maturity, authorized him to make his agreement with the holders to save it from protest, and that the plaintiffs upon being asked not to protest it, and assured that as soon as the defendant returned he would arrange the note, relying upon such assurance, omitted to make demand and give notice ; or if the maker, at the instance and request

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of the defendant, thus knowing the note would not be paid at maturity, and, for the purpose of saving it from being dishonored, called upon the plaintiffs, the holders, and prevailed upon them not to have the note protested, and assured them that the note would be settled by giving a new note in renewal or otherwise, and the plaintiffs, acting upon such assurance, failed to make demand and give notice, then, in either case, these facts amounted to a waiver, or to evidence of a waiver of demand and notice.

The testimony of King, the maker, was the only evidence that was offered as affirmatively tending in any way to establish the facts in issue. It is here set forth in full as follows: "Defendant waived the protest and notice, but thought it could only be done in writing; that, some days before the note sued on became due, he saw the defendant and told him he could not pay it. Defendant said he could not pay it either. Defendant asked who held the note, and said that an effort might be made to renew it. On the morning of the day the note fell due, after a good deal of inquiry, I found it at the banking-house of Lucas & Simonds, where it had been deposited for collection, and there learned that it belonged to the plaintiffs. I was authorized by defendant to make arrangements to save the note from protest, and the necessity of giving notice before defendant started up the river. This was on Saturday morning; on the Wednesday previous, the defendant told me he was going to Palmyra, to be absent until the Monday following. I remarked 'the note will go to protest, which you are desirous not to have done. Could you not get back by Saturday?' He said he would try, and asked me to try and find the note. He did not get back until the Monday or Tuesday of the next week. On Saturday, after I found the note at Lucas & Simonds', and learned that it belonged to Jaccard & Co., I called at their store. Mr. Jaccard said he did not know Mr. Anderson, but knew me. I told him Mr. Anderson would waive the protest on his return and we could arrange about the note afterwards. After Anderson returned, on Monday or Tuesday, I saw him and asked him

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to go to Jaccard's and waive the protest. He said he had no time to go. I then asked him if he would go the next day. He said he would try. On the next day he said he could not go, as he wanted to show Belcher some coal lands in Illinois. On the next day after that I saw him again, and he refused to go altogether and waive the protest. On the Wednesday before he left for Palmyra, Anderson said he would like to waive the protest, or arrange about it, but we did not know who held the note. I asked him to be back on Saturday, and waive the protest if nothing better could be done. He said he would try to do so. I never told Jaccard that Anderson had waived the protest of the note in question, or that he had authorized me to waive it for him, or that he would waive it; but that I believed he would waive the protest on his return, from the conversation I had with him. After Anderson returned he never said he would waive the protest of the note, or any of his rights, or that he had authorized any one to waive it for him."

Taking these statements altogether it is clear for one thing, that they do not show any conversation, negotiation, or agreement of any kind between the defendant and the holders of the note, directly or in person, but only between them and the maker. Whatever may have been the understanding between the maker and the defendant as to a waiver or a renewal, that alone could not affect the rights of the holders, nor excuse them from all diligence for the protection of their own interests. The waiver is a matter between the holder and the party who is to be charged with liability, and any agreement for a waiver of demand and notice must be made between them. There must be some special agreement between the holder and the particular endorser waiving due presentment, and no other party is bound by it. (*Sto. Notes*, § 271.) When such an agreement is made, it makes no difference whether or not there was any other valuable consideration for it than the detriment that might be occasioned to the holder in consequence of the fraud or breach of faith of the endorser, if he were not held to be bound by it; but there

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must be some contract or privity between the parties otherwise it will be a transaction merely *inter alios acta*. (Sto. Notes, §§ 272, 293.) All the cases to which our attention has been called suppose some agreement for a waiver made with the holder, or that the holder is in some way a party or privy thereto. In Coddington v. Davis (3 Den. 16) the endorser wrote to the holder and said, "I will waive the necessity of protest thereof." The agreement binds only the parties to it, or those who have sanctioned it. (Sto. Notes, §§ 272, 291.) There was no such agreement in this case. The matter then is narrowed down to the simple question whether this testimony shows any authority from the defendant to the maker that would enable him as an agent to make such an agreement with the holders in his name, and whether such an agreement was in fact made by him in pursuance of that authority and as the agent of the defendant. The witness begins by saying that the defendant waived the protest and notice, but thought it could only be done in writing. He does not say to whom this waiver was made, but from what follows the inference must be that it was made to the witness only; and it amounted to nothing more than an expression of a willingness to make a waiver, under the supposition, however, that it would have to be done in writing.

He says also that he was authorized by the defendant to make arrangements to save the note from protest and the necessity of giving notice. He does not say that he was authorized to make an agreement to that effect with the holders in the name of the defendant. According to the views above expressed, such an agreement would have amounted to a waiver of demand and notice.

The maker could have saved the note from protest by making arrangements to pay it, or to renew it by giving a new note with a new endorser instead of defendant, and it is by no means clear that such was not the full extent of the authority intended to be given. The witness uses language of his own and not that of the defendant, and taking all his statements together it is pretty evident that he did not him-

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self understand that he had authority to make such an agreement with the holders ; for he expressly says again that he never told the holders that the defendant had authorized him to make a waiver for him, or that he had waived a protest, or that he would waive it ; and that the defendant, after his return, had never said he had authorized any one to make a waiver for him. Jaccard, when called on, said he did not know the defendant, but knew him, the maker ; and he then told Jaccard that the defendant would waive the protest on his return, and they could arrange about the matter afterwards. From all these statements it would seem that the parties all supposed a waiver in writing or a renewal of the note would be necessary, and that the holders relied upon the assurance of the maker, whom they knew, that the defendant would make such waiver, or arrange for a renewal of the note after his return ; and it is very plain that no agreement for a waiver was made with the holders by the maker, acting in the character of agent of the defendant, for that purpose. Nor does it appear that it was upon the footing of any such agreement that the holders were induced to forego the making of the necessary presentment and demand.

This view is entirely consistent with the statement of the witness for the defendant, that, as his counsel, some time previous to the former trial, he had called on King to know what he could state with regard to the matter, and that he then stated emphatically that the defendant never had waived the protest, nor agreed to do so, and that he had never told the plaintiffs that the defendant had waived protest on the note ; but, from what defendant had said to him, he believed he would do so after his return to the city. The result is that there is no evidence whatever here that tended to show a clear and unequivocal agreement for a waiver of demand and notice between the endorser and the holders, either in person or by agent.

Agreements of this sort are to be construed strictly, and not extended beyond the fair import of what is said and done. (Sto. Notes, § 271.) The action of the defendant, at most,



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presents a case of equivocal acts, language, and conduct, only, not amounting to anything definite and decisive. There is nothing in the evidence which amounts to any agreement on the part of the defendant with the holders, in person or by agent, expressed or implied, verbal or in writing, for a present actual waiver of demand and notice; and such an agreement cannot be inferred, in derogation of the admitted rights of the defendant, from any doubtful acts or equivocal circumstances. (Sto. Notes, §§ 287, 295 & 366-7; Sto. Bills, §§ 289 & 371; Gregory v. Allen, 1 Mar. & Yerg. 74; Thornton v. Wynn, 12 Wheat. 183.) Where there is any evidence which tends to prove a waiver of demand and notice, it is a question of fact for the jury to decide, and all the circumstances are to be taken into consideration in order to ascertain whether the promise does or does not amount to a waiver. (Union Bank v. Magruder, 7 Pet. 287; Russell v. Cronkhite, 32 Barb. 282; Sto. Notes, § 279.) But where there is no such evidence, or all the facts proved, if true, do not amount to a waiver, it is purely a question of law, and must be decided by the court. The jury is not to be allowed, by a verdict, upon any general impression or vague opinion of their own, which they may gather from any mass of facts and circumstances which do not amount in law to evidence, or proof of the main fact in issue, to take the property of one man and give it to another.

In Taunton Bk. v. Richardson (5 Pick. 436) the endorser promised the holder to take care of the note and attend to the renewal of it; and this was held to be presumptive evidence of a waiver by him. In Boyd v. Cleveland (4 Pick. 525) the endorser promised that he would take up the note, if not paid by the other party; and this was held to warrant a conclusion that there was a waiver. In Russell v. Cronkhite (32 Barb. 282) the endorser said to the holder, it is "all right; the note is perfectly good; put yourself to no trouble"; and this was held to be sufficient evidence to go to the jury in the question of waiver. In Thornton v. Wynn (12 Wheat.

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183) the defendant offered to take up the note if the plaintiff would give time, and receive other notes in payment; and this was held not to amount to a waiver of due presentment and demand, nor to any admission of the right of the holder to resort to him on the note without fixing his liability in the legal manner; and when the language or circumstances are of a more doubtful and uncertain character than in such instances as these, no such waiver will be inferred. (Sto. Notes, § 279; Prideaux v. Collier, 2 Stark. 57; Fuller v. McDonald, 8 Greenl. 213; Lane v. Steward, 2 App. 98.)

On all the facts appearing here, we think the holders were not justified in presuming that the endorser would waive any of his legal rights in the matter, or that if they ventured to rely upon the personal assurance of the maker, without any communication with the endorser himself, or any distinct agreement made by him, or by the maker as his authorized agent, they cannot complain and must bear the loss.

Our conclusion is, that the two instructions given for the plaintiffs, though they may have been correct enough as general propositions of law, were erroneously given, as having no sufficient basis in the evidence before the jury, and that the fourth and fifth instructions which were refused for the defendant, to the effect that there was no sufficient evidence in the case to entitle the plaintiffs to recover, should have been given.

The judgment is reversed. The other judges concur.

GEO. C. SMALLEY, Plaintiff in Error, *v.* EDWARD HALE, Defendant in Error.

1. *Note—Fraud—Evidence.*—It is a good defence to a note that it was obtained by fraud and misrepresentation. On a question of fraud, the evidence may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, and explain the acts and intentions of the parties.

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Error to St. Louis Court of Common Pleas.

Glover & Shepley, for plaintiff in error.

Knox & Smith, for defendant in error.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon promissory notes. The defence relied upon on the trial was that the notes had been obtained by fraud and misrepresentation. The instructions which were given on either side placed the case before the jury on this defence alone. The evidence furnished an ample basis for such instructions. On the part of the defendant the jury was told in effect that if the payee obtained the notes from the defendant by means of false representations which induced him to execute the notes, or by knowingly concealing material and substantial facts, unknown to the defendant, which, if they had been known to him, would have prevented him from giving the notes, they would find for the defendant; and that the transfer of the notes by the payee did not prevent the defendant from setting up his defence against the plaintiff. And on the part of the plaintiff, the jury were instructed that if the notes were made in consideration of 300 shares of *Ætna* mining stock, without any concealment or misrepresentation of material facts, they would find for the plaintiff, whether the stock was of any value or not. The effect of these instructions, taken together, was that if the notes had been obtained by fraud, either in making false representations, (*suggestio falsi*,) or in fraudulently concealing material facts, (*suppressio veri*,) the defence was good, otherwise not. The matter of fact which the jury was to determine was thus clearly and definitely laid before the jury under correct rules of law governing that issue. (*Montgomery v. Tipton*, 1 Mo. 496; *Buford v. Byrd*, 8 Mo. 240; *Casey v. Smales*, 4 Mo. 77; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Fleming v. Slocum*, 18 J. R. 403; *Edwds. Bills*, 326.)

Some of the instructions which were refused for the plain-

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tiff may have contained correct propositions of law upon the facts supposed in them, but in the issue of fact upon which the case was submitted to the jury, they were immaterial, and need not be particularly noticed here.

The plaintiff objected to the admission of certain parts of the evidence relating to the conduct of the payee; the conditions and affairs of the *Aetna Mining Company*; the insolvency of the payee, the company, and the plaintiff, and to the general history of the transaction. On a question of fraud of this nature the evidence must necessarily take a pretty wide range, and may embrace all those facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions. We have not discovered any material error in the ruling of the court on these matters.

The jury having found for the defendant, on evidence which may reasonably have produced a conviction in their minds of the truth of the facts involved in the defence of fraud in obtaining the notes, the verdict must be allowed to stand.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

ELIZABETH BERSCH, ASSIGNEE, &c., Respondent, v. ENO SANDER, Appellant.

1. *Contract—Performance—Action.*—Where a party enters into a contract for the sale and delivery of property at a stipulated price, the contract being entire, a full performance on his part is a condition precedent to a right of action for the price of any part of the property delivered.
2. *Practice—Assignment.*—A plaintiff suing as assignee of an account, must prove the fact of assignment.

Appeal from St. Louis Circuit Court.

Kehr, for appellant.

I. Smith having failed to carry out his contract, the plaintiff cannot recover on the same, and in support of this posi-

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tion the appellant invokes the familiar principle of law that "where a party enters into a contract which is entire for the sale and delivery of property at a specified price, a full performance on his part is a condition precedent to his right of action against the vendee for the price of any part of the property delivered under the contract." (McKnight v. Dunlap, 4 Barb. 44, and cases there cited; Paige v. Orth, 5 Den., N. Y. 406; Oakley v. Merton, 1 Kern., N. Y. 25.)

In our State the same doctrine has been applied to contracts for labor and service. (Schnerr v. Lemp, 19 Mo. 40, & Aaron v. Moore, 34 Mo. 79.) Smith had agreed to furnish ice from May until the end of December, and having failed to do so the appellant contends that he cannot recover for any part of the ice furnished, although it was accepted by the defendant.

II. But if it be said that by Sander's default in not paying the ice bill for June, when presented to him on the 8th of July, he first violated the contract and thereby placed it in Smith's power to abrogate the contract altogether, we reply that Smith by accepting the part payments afterwards, and especially by continuing to furnish ice as before, waived the right reserved to him by the contract, and having once waived it, he cannot afterwards take advantage of the defendant's laches. "A right once waived is gone forever, and therefore after the waiver the parties stood in the same relation as though no default had ever occurred."

Francis Minor, for respondent.

The evidence fully sustains the allegations of the petition, and shows that respondent delivered the ice called for, and at the prices agreed upon, until appellant failed to pay for it as he was bound to do. The contract being thus broken by the appellant, the parties were at liberty to make any other or further agreement they chose. There is no pretence that the ice was not furnished as charged; the appellant only complains that he had to pay more for a part of it than originally agreed upon. For this he has no one to blame but himself; and even of this he cannot complain, because the evidence

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shows that he accepted it at the advanced price, and that such price was customary and usual. The judgment, therefore, should be affirmed, with damages.

HOLMES, Judge, delivered the opinion of the court.

This was an entire contract. One party agreed to furnish the other with ice during a given time and season, to be delivered from his ice cellar from day to day, at a fixed price per ton, payable monthly for the quantity delivered at the end of each month. It appears that the amount due for the month ending the 8th day of July was not paid when the bill was presented, but that before the 24th day of that month payment had been made and accepted upon it without objection, leaving a balance unpaid on that day of seventy-eight dollars, and that the other party had continued to deliver ice as before up to that time, when he stopped, and refused to deliver any more under the contract, the price having advanced from ten to fifteen dollars per ton. On this state of facts the party must be held to have waived the failure of the defendant to pay the bill on the day when it was presented, and impliedly and virtually consented to give a further credit on the bill then due. Having thus elected to continue the contract, he had no right to present a bill for the current month on the 24th day of July, and refuse a further fulfilment of the contract, and his stoppage then was a violation of the contract on his part without adequate cause. The contract being entire, he was not entitled to recover for any part of it. A full performance on his part was a condition precedent to a right of action for the price of any part of the ice so delivered under the contract. (*McKnight v. Dunlap*, 4 Barb. 44; *Paige v. Ott*, 5 Den. 406; *Oakley v. Merton*, 1 Kern. 25; 2 Pars. Cont. 517-20.) The same principle applies as in cases of servants who leave, without adequate cause, before the end of the time for which they are hired. *Schnerr v. Lemp*. 19 Mo. 40; *Aaron v. Moore*, 34 Mo. 79.) The contract was for the delivery of ice at a fixed price during a whole season, and the party could not break it off in the middle of summer, because the price had risen, without

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a clear breach of the contract on the other side. Having waived the default of the defendant at the time, he could not avail himself of it afterwards under the circumstances proved.

The plaintiff sues as assignee of the account, by virtue of a written assignment on the back of it. The assignment was denied by the answer. No proof appears to have been given of any assignment of the account sued on. It is stated in the bill of exceptions that it was proved that the articles of agreement had been assigned to the plaintiff. It is not apparent how this worked an assignment of the account as alleged in the petition. The petition makes the account the basis of the cause of action, and this was not proved to have been assigned to the plaintiff. On the case made the plaintiff was not entitled to recover, and the defendant's instruction should have been given.

Judgment reversed and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.

EDWARD ROTHWELL, Appellant, *v.* STEPHEN D. MORGAN,
Respondent.

1. *Practice—Written Instrument.*—Where suit is brought upon a written instrument which is not alleged to be lost or mislaid, if it be not filed with the petition, the defendant may, after answer, move to dismiss the suit. (R. C. 1855, p. 1240-1, §§ 59-60.)

Appeal from St. Louis Law Commissioner's Court.

Gardner, for appellant.

Lackland, Cline & Jamison, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff commences his action against the defendant in the Law Commissioner's Court of St. Louis county. The petition was founded on a written instrument, which was not filed in the cause, nor was there any allegation that it was lost or destroyed.

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The defendant filed his answer, and subsequently filed three several motions to dismiss. One of the reasons assigned for dismissal was that the petition was founded upon an instrument of writing charged to have been executed by the defendant, which instrument of writing was not in said petition alleged to have been lost or destroyed, nor was it filed with the petition. The court sustained the motion, and dismissed the cause.

The law evidently contemplates that in every instance where a written instrument executed by a party is the foundation of an action, it shall be filed with the petition. Provision is made for prosecuting an action or maintaining a defence when the instrument is lost or destroyed, but in every such case the loss or destruction of the instrument must be alleged as an excuse for a failure to file the same. (R. C. 1855, p. 1240-1, §§ 59-60.) The omission to file the instrument with the petition, or to allege its loss or destruction, was such a defect as was not waived by a failure to raise the objection by demurrer or answer.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

BASIL W. ALEXANDER *et al.*, Respondents, *v.* RUSSELL H. WESTCOTT, Appellant.

1. *Unlawful Detainer—Landlord and Tenant.*—The time of the service of the notice of the demand for possession of the premises is the time of the demand. Where the premises are let for a fixed period of time, no demand of possession is necessary to authorize the bringing of an action for the unlawful detainer.
2. *Unlawful Detainer—Complaint.*—A complaint in unlawful detainer, alleging that the plaintiffs were the owners and entitled to the possession of the premises; that they leased the premises to defendant for one year from a given date, and that defendant wilfully continued to hold and does hold over the possession after the expiration of the time the premises were demised, is sufficient.

Appeal from St. Louis Land Court.

Defendant and one Hutton, on July 21, 1851, received a

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lease for ten years of a lot in the city of St. Louis, from the trustees of Sarah Orme. Subsequently plaintiffs became the owners of the premises, and at the expiration of the lease relet the premises, by parol, to defendant for one year, upon the same terms with the written lease. At the end of the year, plaintiffs, in writing, demanded possession, and defendant refusing to quit, they sued in unlawful detainer. The complaint alleged that they were owners and entitled to the possession of the premises, and, after describing the house and lot, stated that they "leased said premises to the defendant and one Hutton for one year from 21st July, 1861, and that defendant wilfully continued to and does now hold over the possession of said premises after the expiration of the time they were demised, although due demand in writing had been made upon him for possession."

In the Land Court, defendant moved to dismiss on the grounds—1. Variance between the demand and complaint; 2. The complaint was not within the statute; 3. Duplicity in complaint;—which motion was overruled and excepted to. The plaintiffs proved the parol leasing for one year, and the demand of possession, and the value of the rents. Defendant read in evidence the original lease, and then offered to prove that, after the lease was made, the improvements were spoken of between them; that it was verbally agreed that the lessees were authorized to remove their improvements at the end of the lease, and that they could also remain on the ground longer, at valuation, if the lot was not wanted; which was objected to by the plaintiffs on the ground that the lease must speak for itself. The objection was sustained and exceptions taken.

The defendant then asked the following instructions, which were all refused except No. 4, which was given:

1. The court declares the law to be, that if it is shown from the evidence that P. O. D. Byrne, acting as agent for plaintiffs, on the 21st of July, 1861, verbally authorized Westcott and Hutton to continue in possession of the lot in dispute one year from that date, upon the same terms as the written lease

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read in evidence in this case; and if they further find that the plaintiffs had not been in actual possession prior to that date, and after the date of said written lease, then the plaintiffs cannot recover.

2. The court further instructs the jury, that if they believe from the evidence that James Brackenridge, the lessor in the written lease given in evidence, died before the termination of said lease, and there was no unlawful detainer before his death, and no devise, grant or assignment by him, and no unlawful detainer by holding over at the termination of said lease, then the legal title to said lot so leased passed to his heirs, and was not in any manner within the provisions of the 36th and 37th sections of the act "Forcible Entry and Detainer"; and if the plaintiffs were not the heirs of said Brackenridge, and claimed themselves to be the owners of said premises at the termination of said lease, and through their agent authorized said lessees in said lease to continue one year longer, although they may have acquired the interest of a portion of said heirs, that then said authority was illegal, and they cannot on that ground recover.

3. The court instructs the jury that if the lot in question was leased to Westcott and Hutton jointly, as shown by the written lease read in evidence, and they held the same in common after building the house upon the lot, and there had been no partition by them shown by the evidence except their respective occupation, separately, of the two lower rooms, and that said Hutton sold his undivided interest in said premises (lot and building) prior to the 21st day of July, 1862, to John L. Ferguson, one of the plaintiffs in this suit, and delivered him possession of one of the lower rooms, and there has been no partition between said Ferguson and Westcott, then the plaintiffs cannot recover.

4. The court instructs the jury that the plaintiffs were required to establish by proof every material allegation in their complaint. The complaint alleges substantially that the plaintiffs leased to Westcott and Hutton for one year from 21st of July, 1861, the house on said lot. If the plaintiffs have failed

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to prove a lease of the house as alleged, this will prevent a recovery. (This was given.)

5. The jury are further instructed, that if B. W. Alexander, one of the plaintiffs, has parted with his interest, as set up in the complaint, since this suit was instituted, they must find for defendant.

The court then gave judgment of restitution, with double damages and monthly rents.

P. C. Morehead, for appellant.

I. The complaint is not within section 3 and 16 of the forcibly entry and detainer act of 1855, art. 1. The demand is dated 19th July, 1862, and alleges that the lease terminated on that day. The complaint alleges that the lease terminated on the 21st July, 1862.

II. All persons in actual possession should have been made parties. The complaint is against Westcott for all the premises, including the house. Ferguson, one of the plaintiffs, was in actual possession of the west lower room, and had been before the year terminated. There is no proof that Westcott was in actual possession of any part but the east lower room, and it is also clear in evidence that the other part of the house was in the actual possession of the other persons. (32 Mo. 315.)

III. Defendant's first instruction was improperly refused. The cases of 26 Mo. 581 and 28 Mo. 65 are seemingly in conflict on this point. The record, however, does not present a case to which the latter applies, but a case unaffected by the act of forcibly entry, &c., of 1855, and leaves the principle settled by the first case and cases cited, uninterrupted, that a prior actual possession is necessary to sustain unlawful detainer (such has been the construction of sections 3 and 16 of said act) "by the person having the legal right to such possession." (§ 3.)

IV. The fact appearing in evidence that they never had been in possession is irresistible; or could only be overcome by showing, as their complaint stated, that they were own-

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ers; by showing, as they had a right to do, under the act of 1855, § 40, art. 1, that they were the representatives in some legal way of Brackenridge or Mrs. Orme, and placing themselves within the case of 28 Mo. 65. (6 Taunt. 202, 1815; 1 Marsh. Eng. R. 541, 1815; 1 Bing. 38, 1822; 8 Barn. & Cress. 475, 1828; 1 Penn. 402; 6 Watts, 44; 1 Rawl. 408; 6 Barr., Penn. 163; 15 Ga. 491; 2 Dana, 213; Sheppard's Touch. 254; §§ 36 & 37 *Forcible Entry, &c.*, 1855, art. 1.)

V. A tenant in common cannot maintain unlawful detainer against his co-tenant. On or about the 14th of July, 1862, Ferguson, one of the plaintiffs, bought the undivided interest of Hutton in the premises, and received actual possession of the west lower room; yet Westcott was sued for all the premises. (12 Mass. 153.)

VI. The court erred in refusing the proof offered by defendants as to the improvements. (28 Mo. 70; 1 Starkie, 267; 15 Mass. 85; 3 Atk. 388; 5 Johns. 273; 9 Pick. 298; 3 Metc. 486; 13 Pick. 446; 9 Cush. 31; 14 Serg. & R. 298; 13 La. 136; 16 Serg. & R. 424; 7 Rob., La. 520; 5 Day, 428; 5 Gill. & J. 147; 14 Ga. 429; 1 Greenl. Ev. § 304; Kirby, 399; 6 Whar. 303; 1 Serg. & R. 464; 1 Pick. 48-9.)

Lackland, Cline & Jamison, for respondents.

I. The term was fixed by agreement; it was one year. It required no notice to end it. The defendant knew as well as the plaintiffs that his holding over after the termination of the term for which the premises were demised, or let, constituted his guilt. (7 Mo. 50; 8 Mo. 270; 11 Mo. 605 & 354; 14 Mo. 426; 19 Mo. 310.)

II. Appellant had no right to the improvements on the leased premises; and even if he had, that right was lost to him for not exercising it during the term, and would in no event give the appellant any pretext in law to detain the premises for any time, however short, after the expiration of the lease.

III. The appellant's instructions were all properly refused by the court below. They seek in behalf of the tenant to

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question his landlord's title; this he is estopped from doing; he cannot rent the demised premises of his landlord, and on the next day deny his title and claim to hold for himself, or under any one else. (§ 26, art. 1, ch. 66, R. C. 1855; Stone v. Malot, 7 Mo. 158.)

HOLMES, Judge, delivered the opinion of the court.

This was a complaint before a justice of the peace by the landlords against their tenant for an unlawful detainer in holding over the leased premises after the expiration of the tenancy, under the third section of Art. I. of the "Act concerning forcible entries and detainers" (R. C. 1855, p. 787). The case was removed by *certiorari* to the St. Louis Land Court, and upon a trial had there judgment was rendered for the plaintiffs for a restitution of the premises and double damages, and double monthly value from date until restitution made.

The defendant made a motion to dismiss the complaint for duplicity and insufficiency under the statute, and for a variance between the complaint and the demand in writing. There was no substantial foundation for these objections. The complaint contained all the material allegations required by the third section of the act to constitute a holding over of the premises by the defendant, wilfully and without forcee, after the termination of the time for which they were let to him. (Warren v. Ritter, 11 Mo. 354; Ish v. Chilton, 26 Mo. 256.) The matter of variance between the complaint and the written demand was wholly immaterial, even if there had been any variance. The date of the notice was unimportant: the time of service is the time of demand. In this case, no demand in writing was at all necessary. (Young v. Smith, 28 Mo. 65; Andrae v. Henritz, 19 Mo. 310.)

The tenants had received the possession of the premises from the plaintiffs at the termination of the written lease the year before, and they had accepted the new tenancy and paid rent to the plaintiffs for another year. The plaintiffs were entitled to recover back this possession. The evidence showed

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that the defendant was in possession of the premises, occupying all but one room on the ground floor, which did not appear to have been in the occupancy or possession of any one else. We do not see but the verdict was fully sustained by the evidence. The matter of title and the ownership of the improvements were not a proper subject of inquiry in this action. (*Stone v. Malot*, 7 Mo. 158.) We think the instructions asked for by defendant were properly refused. Double damages may be awarded in such cases. (R. C. 1855, p. 1012, § 9; *Ish v. Chilton*, 26 Mo. 256.)

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

MILES G. DOBBINS AND GEORGE PARSONS, Respondents, *v.*
EDWARD C. HYDE AND LEMUEL W. PATTERSON, Appellants.

1. *Attachment—Estopel—Record.*—A judgment against a garnishee summoned in an attachment suit is conclusive only upon parties to the suit, and does not affect strangers to the record. (*Funkhouser v. How*, 24 Mo. 44.)
2. *Practice—Alien Enemy—Rebellion.*—A defendant in a suit brought or prosecuted by citizens residing in the States affected by the act of Congress of July 17, 1862, p. 590, “to suppress insurrection,” &c., to avail himself as a defence of the disability created by that act, must allege the facts in his pleadings.

Appeal from the St. Louis Court of Common Pleas.

Knight, for appellants.

I. It appeared in evidence that the plaintiffs could have no *persona standi in judicio*, being public enemies, and the first instruction should have been given. (1 Gall. 366; U. S. v. 127 pkgs., 11 Am. L. Reg., 2 N. S., 419; U. S. v. 100 bbls., 12 Am. L. R., 3 N. S., 735; Mrs. Alexander's cotton, 2 Wall. U. S. 404.) Although at common law it was usual to require the defence of alien enemies to be pleaded either in abatement or bar, yet this defence might be given in evidence under the general issue. (1 Chit. Pl. 476, & note; 3 Chit. Pl. 911,

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& note ; 3 Phil. Ev., Cowan, H. & Es. notes, 437 ; 2 Gall. 345, note 1036, et seq.) The old rule of practice, that a plea to the merits waives matters in abatement, no longer obtains in our courts under the new system of pleadings. (R. C. 1855, p. 1232 ; Andrews v. Lynch, 29 Mo. 167.)

Questions of jurisdiction may be raised at any stage of the proceeding in suits *in rem*. (Ward v. Thompson, Newb. Ad. 95.)

II. It being admitted by the pleadings and proved on the trial that defendants had been previously garnished on account of the property in question in the attachment suits in the Common Pleas Court ; interrogatories filed, and defendants having appeared and answered thereto, the jurisdiction of the Common Pleas Court had vested as to said attached property, which was *in custodia legis* from the date of garnishment. (Freeman v. Howe, 24 How. 450 ; Drake Attach. §§ 452-3 & 621 ; Wallace v. McConnell, 13 Pet. 136 ; Shoffield v. Bradlee, 8 Martin, 495.)

III. The record of judgment in the Common Pleas Court, and the other facts set up in the answer as new matter of defence, were a complete bar to this action. There was no denial of this new matter of defence, and the record and other new matter stood as confessed. (R. C. 1865, p. 1233.) The record being in evidence without objection, could not be attacked collaterally.

IV. There is no evidence that defendants did not make a diligent defence in the garnishment suit. On the contrary, their answer to the interrogatories is full and complete denial of their indebtedness to defendant in that case. There never having been any delivery to plaintiffs, they could not maintain replevin. Douglass might have held the goods as against them, and of course his creditors, after service of attachment, had the same right. (Coggill v. H. & N. H. R.R. Co. 3 Gray, 545 ; Haven v. Emory, 33 N. H. 36 ; 2 Kent, 497.)

Rankin, for respondents.

The question of "public enemy" cannot lawfully be con-

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sidered in this court in this case, and it was properly rejected in the court below for the following reasons: 1. The plaintiffs had no warning that they would be required to show affirmatively that they resided in one of the loyal States at the time of the trial. "Alien" or "public enemy" must be pleaded in abatement, or in bar. Two years expired after the President's proclamation before the trial, yet the defendants did not set up this defence, or mention it in their answer. 2. The evidence offered on the subject amounts to nothing, and would not have supported the plea of "public enemy," had it been raised by the answer.

Mr. Chitty says, "Thus, though we have seen that under the general issue it might formerly have been given in evidence, that at the time this contract was made the plaintiff was an alien enemy, yet if the disability accrued by war after the contract was made, the same should be pleaded specially," &c. (1. Chit. Pl. 476-9; 3 Camp. 152; 15 East. 260; 3 Chit. Pl. 911 & note; Russell v. Skipwett, 6 Bin. 241; 2 Greenl. Ev., 6th ed., p. 21, § 19, and cases there cited.) The same doctrine obtains as to the plea of public enemy. Public enemy must be alleged. (Act of Congress July 17, 1862, &c.; Laws U. S. 1861-2, p. 587.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought under the statute for the claim and delivery of personal property, to recover possession of a lot of corn alleged by plaintiffs to belong to them and wrongfully withheld by defendants. Defendants, appellants here, denied in their answer that respondents were the owners of, and entitled to the corn, and as a further defence they stated that before the commencement of this suit they were summoned as garnishees in three attachments suits pending in the St. Louis Court of Common Pleas, wherein one John T. Douglass was defendant, and that interrogatories were duly propounded to them touching their indebtedness to said Douglass on account of said corn. And that although in their said answer they denied all indebtedness as garnishees of

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Douglass, the court gave judgment against them and they were compelled to pay the value of the corn. The case was tried before the court without the intervention of a jury. The respondent proves by John T. Douglass, a commission merchant of St. Louis, that in August, 1860, he purchased the corn in question for them, with their money, and that he had no interest in it; that he stowed the corn with appellants and took from them a warehouse receipt, which he endorsed or assigned to respondents, and that they well knew of such assignment; that on the 12th of October, 1860, he notified the appellants in writing that the said corn belonged to respondents.

On cross-examination, witness stated that at the time of the institution of this suit the respondents were inhabitants of the State of Georgia, and were inhabitants of that State at the last time they were heard from by their correspondents in St. Louis.

The appellants then offered in evidence a transcript of the record from the St. Louis Court of Common Pleas, in the case wherein they had been summoned as garnishees of Douglass and judgment given against them. In their answer to the interrogatories, after making a formal denial, they stated that they had in their possession, stored in their warehouse, 403 sacks of corn, stored with them by said Douglass in his own name, and for which they gave said Douglass a warehouse receipt; that on the 10th day of October, 1860, the day they were summoned as garnishees, they delivered the 403 sacks of corn to the sheriff of St. Louis county; that the sheriff left the same in their possession subject to his order; that they retained the same until the 25th day of January, 1861, when by order of the sheriff they delivered the corn to Dobbins & Parsons, the respondents here.

It is observable that the appellants in their answer on the garnishment made no mention of the claim of the respondents, or that they were notified of the assignment of the warehouse receipt.

Two propositions are urged by the appellants as grounds

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for the reversal of the judgment: 1. That they were discharged from all liability by the proceedings in the garnishment case, and that the record and proceedings in that case constitute a bar to appellant's action; and 2. That appellants were public enemies, and therefore could not maintain a suit in our courts.

We are unable to distinguish this case from that of Funkhouser v. How (24 Mo. 44), where it was held that a judgment against a garnishee, in an attachment, will not protect him against a subsequent recovery in favor of one who had previously to the garnishment taken an assignment of the debt from the defendant in the attachment. And Judge Leonard, delivering the opinion of the court said: "It is a fundamental principle upon which all security for private rights rests, and which never gives way to any other, that no one is bound by a judicial proceeding to which he is not a party, or at least of which he has not had notice and might have become a party. It was competent for the Legislature to provide a mode, upon the attachment of debts, of giving notice thereof, and to require all persons interested to interpose their claims; but they have not done so, and it is not in our power to remedy the omission by declaring the *ex parte* condemnation against the debtor now allowed by law to be exclusive upon the rights of strangers. The sentence binds the parties to the proceedings; but we cannot allow it to do more without violating a principle essential to the preservation of private rights. The evil complained of proceeds from an infirmity incident to all *ex parte* sentences, and we cannot remove it without producing still greater evils. The remedy of the party who pays under such circumstances must be against the attached debtor. As between these parties, the garnishee may recover for money paid by him to the use of the debtor towards satisfying the judgment."

In the case at bar it was not merely an assignment, but the property had never belonged to the debtor. The garnishee had notice of this before he answered; he neglected to set up this matter in his defence, and has paid over the money

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in obedience to the judgment. And even had he set up this defence and it had proved unavailing, it would not have exonerated him in a suit brought by the real owner. He had his remedy and should have pursued it. (*Gates v. Kirby*, 13 Mo. 157; *Dickey v. Fox*, 24 Mo. 217; *Funkhouser v. How*, *ubi supra*.)

By the act of Congress "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862, any person owning property in the loyal States who has given assistance, aid and comfort to the rebellion, is prohibited, after the passage of the act, from conveying or transferring any such property; and it is a sufficient bar to any suit brought by such person for the possession or use of such property, to allege and prove that he is one of the persons described in the act. (Laws U. S. 1861-2, p. 590.) But the party who wishes to avail himself of the disability prescribed in the act as a defence, must allege the fact as well as prove it.

There must be an allegation of the matter contained in the petition or answer, so that an issue can be had thereon. It being entirely omitted in the answer in this case, the court committed no error in disregarding the evidence on that point.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

WILLIAM BAYLESS, Respondent, *v.* ALEXIS LEFAIVRE, Appellant.

1. *Action — Strays — Possession.*— The possession of personal property which will authorize an action for its recovery must be a lawful possession.— Where a party took up a stray, which he kept in his possession for a year without proceeding as a taker up of a stray animal under the statute R. C. 1855, p. 1506, he is to be treated as a trespasser *ab initio*, and cannot recover possession of the animal from a party into whose possession the animal may have again come as a stray.

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Plaintiff asked the following instructions:

1. Peaceable possession of personal property is *prima facie* evidence of ownership, and in this case can only be rebutted by proof of title in the defendant himself. Evidence, therefore, tending merely to show that the colt in controversy belonged to some third person, not a party to this suit, cannot avail the defendant as a defence or justification of his taking the property out of plaintiff's possession.
2. If it appear from the evidence that the colt in controversy was in the peaceable possession of plaintiff for about twelve months, as of his own property, and that defendant, without the knowledge or consent of plaintiff, took possession of the same, and kept it until taken from him by legal process in this case, then the jury will find for the plaintiff, unless it is proven to their satisfaction by the evidence that the colt belonged to defendant.

Defendant asked the following instructions:

1. If the jury believe from the evidence that the horse in controversy is the same colt that came to plaintiff's as a stray, the fact that he took up said colt, and fed him for a year or so, does not give him any title or right to the possession of said colt.
2. Where the plaintiff sues for an animal, he must show title in himself to such animal, or that he is lawfully entitled to the possession thereof; and if the horse in controversy came into plaintiff's possession when a colt, and did not then belong to plaintiff, and was a stray, plaintiff acquired no title or right to the possession of said colt under the stray law, though he may have nursed and fed said colt, and kept him up for a year or more, unless he has shown an exact compliance with the provisions of the law both as regards his own action and that of the justice of the peace before whom the colt was appraised; and in order to give him title or right to possession as a stray, he must show that when he took up the animal, if between the first of April and the first of November,

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it was found within his lawful enclosure ; and if it was not taken up between these dates, then he must show that it was found on his plantation ; that he was a householder, and that within ten days after he took it up he went before a justice of the peace of St. Charles county and made oath that it was taken up on his plantation, and that the marks and brands had not since been altered to his knowledge ; that at least two disinterested householders took an oath that they would fully, fairly and impartially appraise the same ; that they did appraise the same, and that their appraisement embraced a description of the size, color, sex, age, marks and brands of said stray, and that the justice of the peace entered the said description on his stray book ; that the plaintiff, or justice, within fifteen days after such appraisement, delivered or caused to be delivered to the clerk of the County Court of St. Charles county a copy of such entry in his stray book ; that plaintiff, immediately after the appraisement, caused a notice to be set up at three of the most public places in the township in which the stray was posted, containing a copy of the entry in the justice's stray book. If plaintiff has not shown an exact compliance with and performance of the above requirements, he has no right to the possession of the horse or colt in controversy, and you will find a verdict for the defendant.

3. If this horse is not the colt that plaintiff had possession of, you will find for defendant ; and even if it is the same colt that plaintiff had and fed for some time as a stray, you will find for defendant, unless plaintiff has proven that he had the same appraised and posted in accordance with law.

4. It is not necessary for the defendant to show that he is entitled to the possession of the horse sued for, but it is necessary for the plaintiff to prove that he is entitled to the possession of said horse ; and if he has not proved his right to the possession of the horse, you will find for the defendant.

Which the court refused to give, to which refusal the defendant excepted ; and the court of its own motion gave the following :

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"The jury are instructed that the burden of proof as to the right of possession is on the plaintiff; and unless the jury are satisfied from the evidence in the case that the defendant took the property in controversy from the possession of the plaintiff without his consent or knowledge, they will find for the defendant."

To which defendant excepted.

H. C. Lackland, for respondent.

I. The 1st and 2d instructions given for plaintiff are correct. (2 Greenl. § 618; 2 Hill. Torts, 1-13, 32; Criner v. Pike, 2 Head, Tenn. 398; Reader v. Moody, 3 Jones' Law, 372; Gardiner v. Thibodeaux, 14 La. An. 732.)

II. The 3d instruction given for plaintiff is correct. (1 Phil. Ev., C. H. & E. 453, 461-2; Ray v. Bell, 24 Ill. 444, 452; Cafferata v. Cafferata, 23 Mo. 235.)

III. The 1st, 2d and 3d instructions asked for by defendant were properly refused; they assumed that the plaintiff could not maintain his action unless he had, under the provisions of the stray law, or otherwise, perfected a title in himself which would be good not only against the defendant, but against all the world. (See authorities above cited.)

IV. As to the 4th instruction, the one given by the court of its own motion supersedes it, giving the law correctly to the jury in plainer and more comprehensive terms.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff had taken up a stray colt and kept possession of it for a year without any proceedings as a taker up of stray animals, under the statute concerning strays. (R. C. 1855, p. 1506.) At the end of that time the colt strayed again from him, and was taken up by another person, and, while in his possession, was claimed by the defendant as his property, and the animal was given up to him. The plaintiff now brings this suit to recover the same as his property, unlawfully detained. By this act (§ 33) any person who takes up a stray, and fails to comply with the provisions of the act, is subjected

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to a penalty of twenty dollars ; and it is a thing forbidden by law. In such case the party is a transgressor, his possession is unlawful, and he is to be considered as a trespasser *ab initio*. (Harryman v. Titus, 3 Mo. 214 ; Ray v. Davison, 24 Mo. 280.) No claim can arise from an illegal transaction, or one forbidden by law ; and where the plaintiff must bring forward his own unlawful act to support his claim, he must fail. (1 Hill. on Torts, 170 ; Gregg v. Wyman, 4 Cush. 326 ; Forster v. Thurston, 11 Cush. 322.) Such being the character of the plaintiff's possession here, he failed to show any such right of possession as will support this action.

If the plaintiff's possession had been a lawful one, proof of actual possession merely, and that the property had been taken out of his possession, would have supported the allegation that he was lawfully entitled to the possession, and that it was unlawfully detained by the defendant. Such a possession would have been *prima facie* evidence of ownership as against a wrong-doer, or one showing no better title. (2 Greenl. Ev. § 637 ; Bond v. Mitchell, 3 Barb. 303.) But here the plaintiff's possession was not only an unlawful one, but it was proved also that the colt had strayed away completely out of his possession and was lost to him, and that it had been taken up again by another person, from whom the defendant obtained the actual possession. Under these circumstances, it cannot be said that the defendant took the animal out of the plaintiff's possession. In Criner v. Pike (2 Head, 398) the plaintiff's mare had merely gone to her usual range in the woods, and came to the defendant's field in the neighborhood, and it was held that the plaintiff's possession was not destroyed. Here the colt had gone beyond the usual range of the plaintiff's animals, was considered by him as lost, and was found at a distance of five miles off, and within the usual range of the defendant's animals, whence it would seem to have originally strayed. The evidence did not show that the colt was taken out of the plaintiff's possession ; and the possession of the defendant, under a claim of

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ownership, must be considered a better title than any that was shown by the plaintiff.

For these reasons, the 1st, 2d and 3d instructions asked by the defendant should have been given; and the 1st and 2d instructions asked by the plaintiff, as well as that given by the court of its own motion, were erroneously given, as not being warranted by the evidence in the case.

Judgment reversed. The other judges concur.

JASPER et als., Respondents, v. MILLER et al., Appellants.

1. *Practice—Supreme Court.*—Judgment affirmed, with ten per cent. damages, upon failure to file transcript of record and prosecute appeal.

Appeal from Franklin County Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

The appeal in this case was taken at the April term, 1864, of the Franklin county Circuit Court. The appellant has neglected to prosecute his appeal or to show cause for his delay. The appellee produces here in court a perfect transcript of the record, and moves to have the judgment affirmed. The motion is sustained, and the judgment is affirmed, with ten per cent. damages.

Judge Holmes concurs; Judge Lovelace absent.

**JOHN C. HOWELL, EXECUTOR OF NEWTON HOWELL, Appellant,
v. ADELIA A. HOWELL, Respondent.**

1. *Administration—Concealing Assets.*—The provisions of the statute, R. C. 1855, p. 130, §§ 10 & 11, apply only to cases where the person charged with concealing or embezzling the assets, has the goods in actual possession at the time of the commencement of the proceedings. If the property has passed from the possession of the person so charged, the common law rights of action still remain to the executor, but he is precluded from further prosecuting the statutory remedy, because it would be unavailing.
2. *Evidence—Hearsay.*—The declarations of one who is a competent witness at the trial are not admissible in evidence.

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3. *Evidence—Presumption.*—If it be shown that a party has possession of the assets of an estate after the death of a testator, the law presumes that such possession is continued, until the contrary is proven.
4. *Practice—New Trial—Newly Discovered Evidence.*—A party applying for a new trial, upon the grounds of newly discovered evidence, or of surprise by the evidence given by his own witnesses, must show that he has used due diligence or care to direct the attention of the witnesses to the particular point of their testimony.

Appeal from St. Charles Circuit Court.

Lewis, for appellant.

I. The court erred in refusing to grant a new trial on the showing made of material mistake in the witnesses McKinney and Speed. The appellant was entitled to have his case tried with the full benefit of their corrected testimony. All the requisites of an application for new trial on that ground are presented in the affidavits, and it was the imperative duty of the court to set aside the verdict. (1 Gra. & Wat. New Trials, 217-9; D'Aguilar v. Torbin, 2 Mar. 265; Inhab. of Warren v. Inhab. Hope, 6 Greenl. 479; Richardson v. Fisher, 1 Bingh. 145; De Guion v. Dover, 2 Anst. 517.)

II. The court erred in excluding the testimony offered by plaintiff in rebuttal, to show Ferris' disclaimer of ownership. It was a declaration accompanying the act of possession, and explanatory of that possession, and was therefore admissible. (Yarborough v. Arnold, 20 Ark. 592; 1 Greenl. Ev. § 109; 1 Phil. Ev., C. H. & E., 192-201; Muns v. Sturdevant, 23 Ala. 666; Overseers v. Overseers, 2 Caine, 106; Willis v. Farley, 3 Car. & P. 396; Oden v. Stubblefield, 4 Ala. 426.)

W. A. Alexander, for respondent.

This suit was brought under section 7, article 2, of the Administration law, R. C. p. 130. None of the articles claimed in the affidavit were proven to be in possession of the defendant at the time of the commencement of this proceeding. This kind of an action will not lie, unless the party charged with concealing the articles has them in his possession or under his control at the time the affidavit is filed in the County

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Court. (R. C. § 7, p. 130; Dameron's Adm'r v. Dameron, 19 Mo. 317.) This is a penal statute, and must be construed strictly against appellant. Section 11, page 130, says, "If any person be convicted of unlawfully detaining such goods," &c., "the court may compel the delivery thereof by attachment."

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding instituted in the County Court of Warren county under section 7, page 130, of the Revised Statutes of 1855, by the appellant, as executor of Newton Howell, deceased, to recover certain personal property which he alleged belonged to his testator, and was embezzled and concealed by the respondent, the testator's widow. The matter was investigated before a jury in the County Court, and they rendered a verdict in behalf of the appellant for a part of the articles charged to have been embezzled and concealed.

The respondent appealed to the Circuit Court, and then removed the case to St. Charles county by change of venue. Upon a trial in the Circuit Court in that county, the respondent had a verdict and judgment in her favor, and an appeal was taken to this court. In the court below a great deal of contradictory evidence was submitted to the jury, and as they were the proper judges to determine what weight should be given to it, their finding will not be disturbed unless the court admitted that which was illegal and incompetent, or misdirected them in regard to the law.

It is insisted that the court erred in excluding Ferris' declarations, disclaiming any title in the property. The settled doctrine is that the declarations in disparagement of the title of the declarant is admissible as original evidence, and Professor Greenleaf says that "no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of claimant's title or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ*, leaving its effect to be governed by other rules of evidence." But this principle is

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applicable only when the party making the declarations is a party to the suit in possession of the property which is the subject matter of this action. So far as Ferris was concerned he was a competent witness, and his declarations were mere hearsay. The declarations of the testator as to the wife's ownership was incompetent and improper evidence and ought to have been excluded; but as there was other legal evidence on the same point on which the jury might have based their verdict, we will not reverse the case for this error alone.

The first instruction given by the court of its own motion, was to the effect that if the jury believed from the evidence that at and after the death of Howell, the testator, the defendant had in her possession and under her control any of the assets mentioned, and the appraisers were unable to find them when the executor went to take charge of the estate, then the plaintiff had made out a *prima facie* case, and it devolved on the defendant to introduce rebutting testimony to exonerate her from liability. This was exceedingly favorable to the appellant, and the law would not have warranted the court in going beyond it. The fact that she had assets in her possession at and subsequent to the death of the testator, raised a presumption that they still continued in her possession or under her control, but a presumption that was disputable in its nature, and the instruction cast the *onus* of proof on her to show that its possession had been parted with.

The second instruction is in accordance with the statute, which was never intended to apply only in case the person charged with concealing or embezzling the goods had them in actual possession at the time of the commencement of the proceedings. (Dameron v. Dameron, 19 Mo. 317.) The statute was passed with the view of furnishing an expeditious and summary remedy against any person who might either by concealment or embezzlement detain the effects belonging to an estate. If the property had passed from the possession of the person so charged, the remedy afforded by attachment would be powerless. All the common law rights of action still re-

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main to the executor or administrator, but he is precluded from further prosecuting this statutory proceeding, because it would be unavailing.

One more point made by the appellant is, that a new trial should have been granted, because he was surprised by two of his witnesses testifying differently in the St. Charles Circuit Court from what they did in the County Court of Warren county. The affidavit of the witnesses was filed, stating that upon reflection they believed they were mistaken as to one matter deposed to in the trial, and that their testimony was different in the County Court. We perceive no sufficient grounds for disturbing the judgment on this account. It does not appear that any efforts were made to refresh the minds of the witnesses, or direct their attention to that particular point. There is a total want of that diligence manifested which is always required of a party to entitle him to the interposition of this court. Besides, from a careful inspection of the evidence, as contained in the bill of exceptions, we do not think that rectifying the mistake in question would change the result; and without it clearly appears that a different result would probably be produced, a new trial will not be granted. (*State v. Locke*, 26 Mo. 603.)

The judgment is affirmed. The other judges concur.

NICHOLAS REIDEY AND WIFE, Respondents, *v.* JOHN NEWELL,
Appellant.

1. *Practice—Supreme Court.*—Judgment affirmed upon failure to file brief of points and authorities.

WAGNER, Judge, delivered the opinion of the court.

The appellant having failed to file a statement and points as required by the statute, the judgment is affirmed.

Judge Holmes concurs; Judge Lovelace absent.

[END OF OCTOBER TERM.]

ADVISORY CONSTITUTIONAL OPINIONS

OF THE

JUDGES OF THE SUPREME COURT.*

OCTOBER TERM, 1865, AT ST. LOUIS.



1. *Constitution — Railroads — Ordinance.* — The ordinance of the Convention adopted April 8, 1865, does not suspend the right and power of the General Assembly to provide by law for a sale of the railroads, or either of them, until there is a refusal or neglect to pay the tax required to be imposed by the ordinance.
2. *Constitution — Railroads — Sale.* — No such sale can be made without reserving a lien upon all the property and franchises sold, for all sums remaining unpaid by the purchaser.
3. *Constitution — Railroads — Stock.* — When a railroad shall be sold under the ordinance of April 8, 1865, the State cannot receive in payment shares of stock to be issued by the corporation purchasing such railroad. (Const. Art. XI, sec. 13.)

QUESTIONS.

STATE OF MISSOURI, EXECUTIVE DEPARTMENT,
City of Jefferson, November 27, 1865.

To the Honorable the Judges of the Supreme Court.

Gentlemen: — I have the honor to request that you will, in pursuance of the provisions of the Constitution, give me your official opinion in answer to the accompanying interrogatories.

Very respectfully, your obedient servant,

THOS. C. FLETCHER.

Interrogatory First. — An ordinance entitled "An ordinance for the payment of the State and Railroad indebted-

* The present Constitution, Art. VI., sec. 11, provides that "the Judges of the Supreme Court shall give their opinion upon important questions of Constitutional law, and upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives; and all such opinions shall be published in connection with the reported decisions of said court."

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ness," adopted as a part of the Constitution of this State on the sixth day of June, 1865, imposes on different railroad companies, therein named, a prospective tax for the payment of the principal and interest due, and to become due, upon the bonds of the State, or guaranteed by the State, and issued to the railroad companies; the ordinance directs the General Assembly to provide, by law, for the sale of the railroads which shall refuse or neglect to pay said tax. The bonds referred to in the ordinance as "guaranteed by the State" were issued by the Pacific Railroad Company, and guaranteed by the State under the provisions of an act of the General Assembly entitled "An act to secure the completion of certain Railroads in this State," adopted on the 10th day of December, 1855. Several, if not all, the railroads named in the ordinance have made default for many years in the payment of the interest and principal of bonds issued or guaranteed by the State for their benefit. Bills have been introduced into both Houses of the General Assembly providing for the sale of the St. Louis and Iron Mountain Railroad, and of the Southwest Branch of the Pacific Railroad, under the provisions of section 28 of the act above cited; of sections 4 and 19 of an act entitled "An act to expedite the construction of the Pacific Railroad, and of the Hannibal and St. Joseph Railroad," approved February 22, 1851; and of section 1 of an act entitled "An act to expedite the construction of the Iron Mountain Branch of the Pacific Railroad," approved December 25, 1852, and the different acts amendatory and supplementary thereto. If the bills introduced are passed, they will be submitted to me for approval; and it may also become necessary to express my views on the questions involved by special message to the General Assembly. I therefore desire to know whether, in your opinion, the provisions of the ordinance operate to suspend the right of the State to sell the roads named, or either of them, until there is a refusal or neglect to pay the tax imposed by the ordinance; or whether the State may order the sale of the railroads, or either of them, prior to such refusal or neglect.

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Interrogatory Second.—If you are of opinion that the sale of the railroads may be ordered before such refusal or neglect, I request you to say whether such sale can be made “without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid,” as provided by section 5 of the ordinance. In other words: does this clause in the ordinance constitute a condition of *all* sales of railroads ordered by the State, or does it refer only to sales made, under the ordinance, for refusal or neglect to pay the tax?

Interrogatory Third.—If you should hold that all sales of railroads, by authority of the State, are subject to the restriction mentioned in my second interrogatory, I request you to say whether the words “all sums remaining unpaid” refer to the sums for which the railroad to be sold is in default, or whether it refers to that portion of the purchase money, whether more or less than the claim of the State, which is not paid in cash at the time of sale.

Interrogatory Fourth.—In case of a sale of a railroad under the lien of the State, does the 13th section of the eleventh article of the Constitution authorize the State to receive, in payment of the purchase money, preferred or other shares of stock issued by a corporation purchasing such railroad?

O P I N I O N .

I N T H E M A T T E R O F Q U E S T I O N S O F C O N S T I T U T I O N A L L A W , S U B- M I T T E D B Y T H E G O V E R N O R N O V E M B E R 2 7 , 1 8 6 5 .

The ordinance of the State Convention which was adopted in Convention on the 8th of April, 1865, and became a part of the Constitution of the State on the 6th day of June thereafter, does not purport to dispose anew of the whole subject matter of the State and railroad indebtedness. It makes certain provisions only on the subject. It provides, for one thing, that a tax shall be imposed on the several railroad companies named, for the purpose of raising a fund to be ap-

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plied by the State to the payment of the interest and bonds for which the companies are respectively liable to the State; and for a sale of the railroads, under the liens reserved to the State, if the tax be not paid and the company is in default on her indebtedness to the State, the proceeds to be applied to that indebtedness. It provides, for another thing, in what manner railroads purchased by the State under her lien shall be sold again by the State for the purpose of reducing the State debt. And it further makes it the duty of the General Assembly to provide by law for the payment of all the State indebtedness not provided for in these ways, and for a tax to be levied on real estate generally towards that end. For the purpose of enforcing a compliance with the laws in respect of the tax imposed on the railroad companies, it ordains that, in case of a refusal or neglect on their part to pay the tax, the General Assembly shall proceed to provide by law, for that reason alone, (if the company be also in default to the State on the bonds and interest for which they are liable,) for a sale under the lien reserved to the State, and appropriate the proceeds to the payment of the indebtedness of that company for which the lien is reserved. In this case the ordinance commands a sale; in any other case the matter is left (where it stood before) at the discretion of the Legislature. The act of March 21, 1863, (Laws of 1863, p. 14,) had required the Governor "to make no sale of the railroads of this State," as was then required by law, until directed by the General Assembly. The fourth section of the ordinance makes it imperative on the General Assembly to give this direction, and provide by law for a sale, under the lien of the State, (as required by previous laws,) of any railroad which shall have failed to pay the tax, and which continues also to be in default in the payment of the interest or the principal of the bonds for which the company is liable to the State; but the power of the Legislature to direct a sale under the lien of the State, in pursuance of the provisions of the previous laws, and for the reason only that the company

Answer to Questions submitted by the Governor Nov. 27, 1865.

is in default on her bonds and interest, is not taken away, nor in any way restricted or impaired.

The fifth section relates to all sales of railroads under the liens reserved to the State, whether directed by the General Assembly at their own discretion, under previous laws, and for the reason only that the company is in default to the State in respect to her bonds and interest, or in obedience to the command of the ordinance, for the reason that the company is in default both as to the tax and the bonds. In either case, the reason why the railroad is so directed to be sold is unimportant, on the question of power; and when the State has become the purchaser of any railroad sold under the lien of the State, it is ordained that the General Assembly shall provide, by law, in what manner such railroad shall be again sold by the State for the payment of the indebtedness which the State has incurred on account of bonds loaned or guaranteed for the benefit of these companies. The General Assembly would have had this power without the aid of the ordinance; but the fifth section provides further, that "no sale or other disposition of any such railroad or other property, or their franchises, shall be made by the State without reserving a lien upon the property sold for all sums remaining unpaid"—that is to say, by the purchaser—and the purchaser is required to make all payments therefor "in money, or in bonds or other obligations of this State"; but the Legislature is left unrestricted further as to the time, terms and conditions of the sale. The sale may be for cash or on credit, in whole or in part; but if any part of the purchase money remain unpaid when a sale is made, a new lien is to be reserved to the State for that amount. This latter clause is somewhat indefinite and obscure; but this would seem to be the only rational construction that can be given to it. In the first part of the section, it declared in effect that the sale by the State, after having become the purchaser under the lien, shall be made for the purpose of liquidating the indebtedness of the State for which the company has been in default; but in this latter clause of the section, when a new lien is to be

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reserved against the purchaser from the State, different language is employed, and the words "all sums remaining unpaid," as applied to the immediate subject of the clause, are most fit and proper in reference to the new purchaser, for any balance of the purchase money that may remain unpaid by him, in case the sale shall be made in whole or in part on time. If the State could never sell the railroad without reserving a lien for the whole indebtedness of the former company to the State, she might never be able to sell at all, and so be in a worse condition than she was before. When the State becomes the purchaser of such railroad under the lien reserved, both the lien and the former company are extinguished, and the indebtedness is extinguished with the company. The State remains liable for her own bonds, and owns the railroad; and it would seem to be the clear intent of the ordinance that the Legislature should have power to sell and dispose of the property so owned by the State for money or bonds, reserving only a lien for the unpaid balance of the purchase money in case a credit should be given on any part of it.

In accordance with this view of the ordinance, we answer the questions propounded as follows:

1. We are of opinion that the ordinance does not suspend the right and power of the Legislature to provide by law for a sale of the railroads, or either of them, until there is a refusal or neglect to pay the tax imposed.

2. We are of opinion that no sale of any railroad, ordered before a refusal or neglect to pay the tax, can be made "without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid," and that this is a condition of all sales of railroads which may be ordered by the State.

3. We are of opinion that the words "all sums remaining unpaid," in the fifth section of the ordinance, refer to the sums for which the railroad is sold—namely, the purchase money not paid in cash or bonds at the time of the sale—and not to the former indebtedness of the railroad company to the State.

Answer to Questions submitted by the Senate Dec. 9, 1865.

4. We are of the opinion that the thirteenth section of the eleventh article of the Constitution of the State does not authorize the State to receive in payment for a railroad sold by the State preferred or other shares of stock issued by a corporation purchasing such railroad. It would seem to be the clear intent of that section that the State shall not become a stockholder in any corporations or associations, otherwise than as may be necessary in order to secure the loans which have already been made to certain railroad corporations, in which it might become necessary or expedient for the State to become a stockholder as a purchaser under liens held by the State; and we think it would not be within the scope or intention of this section that the State should become a stockholder in any other corporation or association, by taking their stock in payment for a railroad sold by the State, and thus embarking the capital of the State in the business or enterprises of such corporations or associations.

DAVID WAGNER,
NATH. HOLMES.

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1. *Constitution—Judicial Power, extent of, under Const., Art. VI., sec. 11.*—The Judges of the Supreme Court must determine what are questions of "Constitutional law," and what are "solemn occasions," within the meaning of sec. 11, Art. VI. of the new Constitution, upon which they must give their opinions. The questions to be answered must be questions of law only involving the construction or meaning of some part of the Constitution; and must be in their own nature judicial questions, the final determination of which belongs to the Judicial Department.
2. *Constitution—Departments.*—The Executive and Legislative departments of the Government are, in the first instance, the proper judges of the extent of their own constitutional powers and duties.

Q U E S T I O N S.

The Senate adopted a resolution propounding to the Supreme Court the following inquiries:

First.—Has the General Assembly power to increase the capital stock of any incorporate company, now in operation, granted by this State heretofore?

Answer to Questions submitted by the Senate Dec. 9, 1865.

Second.—Can the General Assembly so alter, change, or modify, the act of any incorporated company doing business as to enlarge its powers, change its number of directors, or add new branches of business to its functions, provided such change, alteration, or modification, does not destroy the original object contemplated in the act of incorporation?

Third.—Does sec. 6 of Art. 8 apply to incorporated companies doing business in the State before July 4, 1865, under special and general laws both, or under general only?

O P I N I O N .

IN THE MATTER OF QUESTIONS OF CONSTITUTIONAL LAW SUBMITTED BY RESOLUTION OF THE SENATE OF THE STATE OF MISSOURI, DECEMBER 9, 1865.

With every disposition to comply with the wishes of the Senate, as expressed in their resolution directing the foregoing inquiries to be presented for our opinion, under the duty imposed upon us by the eleventh section of the sixth article of the Constitution of the State, we have addressed our minds to the consideration of the subject; but we have met with difficulties at the outset, arising out of the general and indefinite nature of the questions proposed, which have made it necessary for us to consider, and, in some degreee, to define the extent of, the obligation imposed and the limits of the power conferred on the Judges of the Supreme Court by that provision of the Constitution. It is that “the Judges of the Supreme Court shall give their opinion upon important questions of Constitutional law, and upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives; and all such opinions shall be published in connection with the reported decisions of said court.” (Const. the State of Mo., Art. 6, sec. 11.)

The power conferred is limited to “important questions of Constitutional law, and upon solemn occasions,” and then only when required by the Governor, the Senate, or the House of Representatives. It is obvious that the Governor, Senate,

Answer to Questions submitted by the Senate Dec. 9, 1865.

or House of Representatives, must judge for themselves when they will require such opinions, and that the Judges must determine what are "questions of Constitutional law," and what are "solemn occasions" within the meaning of this section. And, first, it must be a question of law only, and it must arise upon the Constitution alone. It can scarcely be any other than some question of the proper construction and true meaning of some provision, clause, or words, contained in the Constitution; and it must be, in its own nature, a judicial question, the final determination of which, by the organic frame of our Government, properly belongs to the Judiciary. In calling for such opinions, to be given in a manner somewhat novel and extra-judicial, and in matters not in litigation between contending parties, it must have been understood by the framers of that instrument, and would seem to be the clear intent of the section as it reads, that such questions should be important in reference to the public interest, and the necessary and immediate action of the Executive or Legislative branch of the Government, upon some matter of unusual magnitude and solemn concern for the public good, and on a pure question of law, which could only be finally determined by the Supreme Court as a judicial question.

It could not have been intended, nor does the language of the Constitution import or imply, that the Judges shall undertake, in a general way, to mark out and define at once, and, as it were, in advance, all the powers of the Governor, or of the General Assembly, under the Constitution. It cannot, certainly, be construed to mean that the Judges of the Supreme Court shall become the legal advisers of the Governor, or of either House of the General Assembly; nor that they shall take the place and perform the functions of the Attorney General. It cannot be understood to embrace questions of Constitutional law merely as affecting the private affairs and legal rights of corporations or individuals, but only as they may concern the action of the executive or legislative branches of the State Government. Nor can it be held to include questions relating to the operation or effect of the

Answer to Questions submitted by the Senate Dec. 9, 1865.

Constitution or of any enactment proposed to be made by the General Assembly upon incorporated companies or private persons. Such matters would more properly, if not necessarily, be the subject of judicial determination when brought before the courts by the parties litigant, in due form and course of legal proceeding. The power of the Legislature to pass laws in such cases must depend, in some degree, upon the vested rights of the parties to be affected by such legislation, and such vested rights, and indeed any individual rights, cannot be ascertained and determined in this manner. It would not be possible for the Judges to say, in answer to a general and indefinite question, what the powers of the General Assembly, in such matters, might be; nor to define what corporations might come within the operation of any given section of the Constitution; and such an inquiry would not present any such distinct, specific and pure question of Constitutional law as was contemplated by the section in question.

The executive and legislative branches of the Government are the proper judges of their own constitutional powers and duties in general, and in the first instance; and it is only when some distinct question of constitutional powers is raised and presented as a judicial question, having an immediate, direct and important bearing upon the action of the Governor, or either House of the General Assembly, upon some public and solemn occasion, depending for its solution upon a judicial construction or interpretation of some provision, clause or word of the Constitution, that the Judges would be authorized by this section to prescribe and define the extent or the limits of such power. On questions so general, vague and undefined, any answers we could undertake to give, instead of being a light and a guide, might prove to be but a snare to the feet.

In view of these considerations, though much more might perhaps be fitly said, we trust it will be apparent to the Senate that the inquiries proposed by the resolution do not present to us any such distinct and pure questions of Constitu-

Answer to Questions propounded by the Governor Jan. 22, 1866.

tional law as were contemplated by the Constitution. We, therefore, feel constrained to decline giving any further answer to these inquiries.

DAVID WAGNER,
W. S. LOVELACE,
N. HOLMES.

JANUARY TERM, JEFFERSON CITY, 1866.

1. *Constitution—North Missouri Railroad—Lien.*—The General Assembly had, at the time of the passage of the act of February 16, 1865, (Laws of 1865, p. 90,) the constitutional power to relinquish and release the first mortgage lien upon the franchises and property of the North Missouri Railroad as provided in said act.

QUESTION.

EXECUTIVE DEPARTMENT, Mo.,
City of Jefferson, January 22, 1866.

To the Hon. the Judges of the
Supreme Court of the State of Missouri.

Gentlemen:—It is important to the interests of the State that I should have the opinion of the Supreme Court as to the Constitutional power of the Legislature to pass the act entitled "An act to provide for the completion of the North Missouri Railroad and its West Branch, and for the construction of a bridge over the Missouri river," approved February 16, 1865. So far as said act operates as a release of the first lien of the State on said railroad, and to a contract with the said North Missouri Railroad Company to permit it to make another and prior lien on said road, please give me your opinion.

Very respectfully,

THOS. C. FLETCHER.

Answer to Question propounded by the Governor Jan. 22, 1866.

O P I N I O N .

ANSWER TO THE QUESTION OF CONSTITUTIONAL LAW, PRO-
POUNDED BY THE GOVERNOR TO THE JUDGES OF THE SU-
PREME COURT, JANUARY 22, 1866.

We understand the question to be, whether the General Assembly had the constitutional power, by the act entitled "An act to provide for the completion of the North Missouri Railroad and its West Branch, and for the construction of a bridge over the Missouri river," approved February 16, 1865, to relinquish and release (Laws of 1865, p. 90) the first mortgage lien and pledge of the income of the said road, reserved to the State by the act entitled "An act to expedite the construction of the North Missouri Railroad," approved December 23, 1852, (Laws of 1853, p. 8, secs. 3 & 7,) or any other acts, so as to enable the said North Missouri Railroad Company to put another and prior mortgage lien on said road, as provided in the said act of February 16, 1865.

We have fully considered of the matter, and are unanimously of the opinion that the General Assembly had the constitutional power, by the act aforesaid, to relinquish and release the said first mortgage lien and pledge for the purposes mentioned in the said act of February 16, 1865.

The other Judges concur.

N. HOLMES.

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JANUARY TERM, 1866, AT JEFFERSON CITY.

WILLIAM D. ADAMS, ADMINISTRATOR OF DAVID ADAMS, DECEASED, Plaintiff in Error, *v.* WILLIAM H. TRIGG, Defendant in Error.

1. *Pleading—Answer.*—An answer may contain several different defences, but they must be consistent with each other, and must be separately stated. The defendant cannot in his answer deny, and then confess and avoid the cause of action.

Error to the Cooper Circuit Court.

Draffen, Hutchison & Muir, for plaintiff in error.

I. Only a single issue was presented by the pleadings in this case. The only material part of the defendant's answer was the denial that the plaintiff's intestate had made the deposit in question, and the court erred in refusing plaintiff's instructions first asked for, raising this point. The remainder of the answer has reference to a deposit alleged to have been made by the plaintiff of his own money and in his own right. Whether the plaintiff, in his own right, had made such a deposit, and what had become of the deposit, could not be tried

Adams' Adm'r v. Trigg.

in a suit in his representative capacity as administrator of David Adams, for a deposit made by deceased in his lifetime. (Coble v. McDaniel, 33 Mo. 363.)

II. But assuming that the defendant, by his answer, intended to admit that the alleged deposits were really made by the plaintiff's intestate, then the answer contained several distinct and inconsistent defences, and the court erred in overruling the plaintiff's motion to strike it out. This answer is clearly multifarious, and sets up several inconsistent defences, and should have been stricken out. (R. C. 1855, p. 1233, § 14; Atterberry v. Powell, 29 Mo. 429.)

Douglas and Gage, for defendant in error.

I. The first question arises on the pleadings: Were the defences set up in the answer well pleaded? Under the present system of pleading the answer is good. "The defendant may set forth by answer as many defences as he may have." (2 R. C. 1855, p. 1233, § 13; St. Louis Pub. Schools v. Risley, 28 Mo. 415.) The allegation of facts in the alternative, as in this answer, is authorized by the Code. (R. C. 1855, p. 1238, § 46.) Courts of New York have held that different and inconsistent defences may be set up in the same answer; and they have gone so far as to decide that "the defendant may set up any matter which will prevent a recovery." (Sweet v. Tuttle, 10 How. Prac. 40; Hackley et al. v. Ogment, *ib.* 44; Heaton v. Wright, *ib.* 79; Stiles v. Comstock, 9 How. 48; Butler v. Wentworth, How. 282; Hollenback v. Clow, How. 289; Ketcham v. Zerega, 1 E. D. Smith, 560; Brown v. Ryckman, 12 *ib.* 313.) The case of Atterberry v. Powell, 29 Mo. 428, is in conflict with the statutes and with the weight of authority.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff, as administrator, to recover of the defendant certain Missouri bank bills and United States treasury notes alleged to have been specially deposited with him by the plaintiff's intestate.

Adams' Adm'r v. Trigg.

Defendant in his answer denied that any such deposit was made by plaintiff's intestate; but admitted that the plaintiff in his own name made two special deposits with him. He then stated as a defence that the said deposits were delivered back to the plaintiff, or if any part was not so delivered, the same was lost without the fault or negligence of the defendant, and that he was ignorant whether it was the one fact or the other. Plaintiff then filed his motion to strike out the answer, because it set up inconsistent defences, and was multifarious; which motion was by the court overruled. On a trial before a jury the defendant had a verdict in his favor, on which a judgment was rendered by the court, and the case comes here on writ of error.

Under our present system of practice an answer may contain several different defences, but they must be consistent defences and separately stated.

The court erred in overruling plaintiff's motion to strike out defendant's answer, except that portion embodied in the first paragraph. The only material issue tendered in the case was in regard to the deposit alleged to have been made by the plaintiff's intestate; the other matter set up was immaterial, irrelevant, and not pertinent. It had relation to a different party, and went to establish a matter which was not a triable issue. The substantive averment in the petition was the fact of the alleged deposit by the plaintiff's intestate, and the denial of that fact in the answer presented the only question for trial or adjudication by the court. A party will not be permitted to positively deny the material allegations set forth in the petition, and in the same answer allege other defences wholly and directly inconsistent. He cannot interpose a denial, and then avail himself of a confession and avoidance.

The judgment is reversed and the cause remanded; the other judges concur.

McClurg et als. v. Hurst.

JOSEPH W. MCCLURG AND OTHERS, SURVIVING PARTNERS OF THE FIRM OF MCCLURG, MURPHY & Co., Defendants in Error, *v.* HENRY HURST, Plaintiff in Error.

1. *Practice—Judgment—Trial.*—Where the defendant goes to trial without having filed an answer, and the damages are assessed without the previous entry of an interlocutory judgment, he will be considered as having waived the irregularity.

Error to the Moniteau Circuit Court.

Ewing & Smith and *E. S. Knight*, for plaintiff in error.
W. G. Howard, for defendants in error.

HOLMES, Judge, delivered the opinion of the court.

The petition contained two counts, one upon a promissory note, and the other upon an account. At the return term, the defendant appeared and obtained leave to file his answer within sixty days before the next term. On the third day of the next term the parties, plaintiff and defendant, appeared by their counsel. The case was tried by a jury, and a final judgment was rendered upon the damages assessed. No answer had been filed, and no judgment by default, *nil dicit*, or confession, had been previously rendered. If the defendant had not appeared at all, or if he had refused to go into an assessment of the damages before the entry of a judgment by default, *nil dicit*, or confession, and had taken proper exceptions to any other course of proceeding at the time, he might now be heard to complain of error committed. But having made no objection, and having voluntarily proceeded with an inquiry of the damages in the same manner as if an answer had been filed raising an issue for trial, or as upon an issue confessed, he must now be taken to have confessed the cause of action, and waived all right of exception to that manner of proceeding. In cases of default, *nil dicit*, or confession, *relictâ verificatione*, the judgment, when for the plaintiff, is generally *quod recuperet*, and it may be either in-

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terlocutory or final. (Steph. Plead. 108-10.) It is properly interlocutory in all cases of unliquidated damages, or when, as provided by the statutes, the suit is not founded upon any instrument in writing, and the demand is not ascertained by such instrument. (R. C. 1855, p. 1279, § 9.) The plaintiff was entitled under the statute (Laws of 1863-4, p. 24) to a trial of the cause, or to an interlocutory judgment and an inquiry of damages at that term. The only object of the inquiry was to ascertain the amount for which final judgment was to be rendered, and if both parties were ready to proceed at once to an assessment of the damages, the defendant confessing the cause of action, it would evidently be a mere question of form, in the entry of the judgment, whether it were interlocutory or final. It may be considered as both interlocutory and final, the two forms being merged in one. If writ of inquiry had been ordered for another day, any judgment rendered before that day would necessarily have been interlocutory only. Whatever irregularity there may have been in the proceedings, we think it may be considered as having been waived by the action of the defendant himself, and it is not apparent to us that any injustice has been done to him by the judgment which was rendered.

Judgment affirmed. The other judges concur.

JACOB A. PRICE, Respondent, *v.* THOMAS ADAMSON, Appellant.

1. *Constitution—Officers—Revenue.*—The sheriff is, by virtue of his office as sheriff, collector of the State and county taxes; the two offices are one and inseparable. The ordinance of the Convention, passed March 17, 1865, vacating the offices of sheriffs, &c., on May 1, 1865, deprived the sheriffs of all authority as collectors of the revenue. The offices were vacated altogether.
2. *Practice—Appeal—Records.*—An appeal may be taken from the judgment of the Circuit Court rendered upon a citation issued by virtue of R. C. 1855, p. 1311, § 8, the same being a final judgment in a civil case.

Price v. Adamson.

Appeal from Lafayette Circuit Court.

De Motte, for appellant.

I. The judgment of the court is in contravention of a public statute, and is void.

1. To sustain the proposition that the judgment is contrary to law, reference is made to the ordinance of the Constitutional Convention of this State, commonly known as the vacating ordinance, passed March 17, 1865. By this ordinance the office of sheriff of Lafayette county was vacated on the 1st day of May, 1865. Sec. 1, p. 1310, R. C. 1855, provides that all officers at the expiration of their term of office, or when their offices are vacated, shall turn over all books and papers, &c., to their successors. Sec. 1, Art. 3, p. 76, Acts 1864, provides that the sheriff shall be collector from the first day of the month next succeeding his election as sheriff. Price was elected in November, 1864; consequently no other person could be collector for 1865 while he remained sheriff. In other words, no person but the then sheriff could be by law the collector for 1865. It is plain, then, from the provisions cited, and from the whole tenor and effect of the revenue laws of the State, that the sheriff's and collector's office is one and the same, and that when the office of sheriff is declared vacated, the office of collector is declared vacated. It would be doing violence to the plain intent and meaning and legal effect of the vacating ordinance to say that it only incapacitated an officer to perform one-half of his official duties, when it declared his office vacated.

2. The facts found by the court could not warrant the judgment of the court below. These facts, though true, (and appellant does not dispute them,) do not warrant the court in pronouncing judgment that the respondent was entitled to exercise a part of the functions of his office four months after his office had been declared vacant by competent authority.

II. The facts found by the court do not sustain the judgment.

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1. The judgment of the court below is a final decision or judgment "in a civil cause." (R. C. 1855, § 9, p. 1287.)

2. This cause is now in this court in accordance with provisions 13 & 19, p. 1288, R. C. 1855. If the sections referred to are not designed to allow erroneous judgments to be appealed and passed upon by this court when the necessary steps have not been taken in term time in the court below, they are seemingly without meaning.

3. The case of *Howard v. The State* only decides that a collector cannot, by resigning, relieve himself and his securities from liability on his bond. It does not decide that the people in convention assembled cannot declare an office vacated. The statute under which this decision was made is materially different from that of the present.

Ryland and Green, for respondent.

I. The proceeding is not a suit and was not embraced in the general statutory provisions authorizing appeals to this court, and no provision is made by the statute under which the proceedings were had providing for an appeal, nor is the judge before whom such a citation is heard required to preserve any record of the proceedings, which may be heard at chambers. (R. C. 1855, p. 1311, §§ 8 & 9.)

II. The evidence in the case is not before this court by bill of exceptions, and there is nothing in the record showing that the appellant Thomas Adamson was at the time sheriff of Lafayette county, or that he had ever been appointed or qualified as sheriff or collector for said county, or had any right whatever to the tax book for the year 1865.

III. To entitle the party to the benefit of objections to any of the rulings and findings of the court below, it should appear upon the record that the same objections were made in that court. (*St. bt. Thames v. Erskine*, 7 Mo. 213; *Long v. Story*, 13 Mo. 4; *Mehl v. Waldorf*, 35 Mo. 466.)

IV. Where a verdict is rendered and no motion is made to set it aside, the court will affirm the judgment of the court below. (*Higgins v. Breen*, 9 Mo. 493; *Watson v. Pierce*,

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11 Mo. 358; Fugate et al. v. Muir, 9 Mo. 351; Richard v. White, 11 Mo. 623.)

V. There is no error in the judgment of the Circuit Court. The collector of the revenue for any given year is an entirety, and the collector having received and receipted for the tax book, and entered upon the collection before going out of office, can only release himself and securities by collecting and paying over the taxes for that year. (Howard v. The State, 8 Mo. 361.)

HOLMES, Judge, delivered the opinion of the court.

This proceeding arose under the act concerning the recovery of public records, (R. C. 1855, p. 1810,) the first section of which provides that if any civil officer, having any record, books, or papers, appertaining to any public office, shall resign, or his office be vacated, he shall deliver to his successor all such records and papers. It appears that the respondent Price was elected sheriff of the county of Lafayette, in November, 1864, and was duly qualified, and entered upon the duties of his office, both as sheriff and *ex officio* collector, and that on the 25th day of April, 1865, he received and receipted for the tax books of Lafayette county for the year 1865, as such collector. On the 17th day of March, 1865, the people of the State of Missouri, in Convention assembled, by an ordinance of that date, had vacated certain civil offices, among which were those of all the sheriffs in the State, and ordained that the same should be filled for the remainder of their respective terms by appointment of the Governor.

It appears by the record that on the 7th day of August, 1865, the respondent Price made application to the Circuit Court of Lafayette county for a citation to be issued against Thomas Adamson, sheriff of the county, the appellant here, upon an affidavit, which stated the fact of the election and qualification of the respondent as sheriff and *ex officio* collector of said county, and that he entered upon the duties of the office, and received the fees and emoluments thereof, and the possession of the books and papers appertaining thereto,

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until the expiration of his said term of two years; that since the adoption and going into effect of the new Constitution of the State, he had subscribed, sworn to, and filed with the county clerk, the oath prescribed by the Constitution. The affidavit further stated that one Thomas Adamson procured the issuing of a warrant by one of the judges of the Supreme Court, under the statute in such case made and provided, to take from the custody and possession of the affiant the books and papers belonging to his said office of sheriff, and to procure them to be delivered to the said Thomas Adamson; by the execution of which said warrant, great damages and injury would be done and accrue to the affiant, by depriving him of the books and papers pertaining to said office; wherefore he prayed for a citation to be issued, requiring said Thomas Adamson to appear before the court on a day to be named, that his right in the premises might be determined. And afterwards, on the 23d day of August, the said Price appeared and waived all matters in his said affidavit, except as to his right to the tax book of 1865, and the said Adamson came and waived the issuing of a citation, and asked the court to decide whether he or the said Price was entitled to the tax books of said county for the year 1865.

It further appears that, "the court, after hearing the allegations and proofs, finds the facts as follows: That said Price was, at the time of receiving said tax books, on the 25th day of April, 1865, the legal collector of Lafayette county, Mo., and as such received for the tax books of 1865, as before stated, and thereby bound himself and his securities for the same. It is therefore adjudged by the court that the said Price is entitled to the custody and collection of the same, and that he and his securities are alone responsible for it."

From this judgment Adamson takes an appeal to this court. There was no motion for a new trial or an arrest of judgment, and the only questions that can be noticed, are those arising upon the face of the record, being such only as are raised by an appeal or writ of error. The proceeding was had under the eighth section of the act concerning public records, which

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provides that any person aggrieved by any such warrant (as that provided for in the fifth section, commanding the seizure of all records, books, and papers, appertaining to any public office, and the delivery of them to the proper officer, to be named in such warrant,) may apply to any judge of the Supreme or Circuit Court, who, upon affidavit of the applicant that injustice has been done by such warrant, shall issue a citation to all persons interested, commanding them to appear before him at a place and time named in the citation. And by the sixth section of the act it is further provided that the judge shall proceed in a summary manner, and determine [the proceeding] according to right and justice. This act makes no provision for an appeal in such case. It seems to contemplate a proceeding before a judge at chambers, or in vacation, and not before a court. However this may be, the Circuit Court took jurisdiction of this case, and proceeded to pronounce judgment, finally concluding the rights of the parties in the premises. The 9th section of the "Act concerning practice in civil cases" provides that any person aggrieved by any final judgment of any Circuit Court of any civil case, may make his appeal to the Supreme Court, (R. C. 1855, p. 1287,) and this appeal was taken under the same act, (§§ 13, 14, & 19,) and there can be no doubt that this was a final judgment, a decision of a Circuit Court in a civil case, from which an appeal will lie.

The court below, as well as this court, is bound to take judicial notice of the Constitution, ordinances, and statutes of the State; and the facts appearing by this record to have been brought before the court upon this application, showed that the only right or title which the respondent claimed to the office of sheriff and *ex officio* collector of the county of Lafayette, was that arising by virtue of his election to that office in November, 1864. The question of law was thus presented whether the ordinance had the effect to vacate said office. This ordinance expressly declared the offices of all sheriffs in the State vacated on the first day of May, 1865. This is too clear to admit of any doubt or question. The

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statute then in force provided that every sheriff hereafter elected, (except the sheriff of St. Louis county,) shall be, *ex officio*, collector of the revenue, within the county, for two years, commencing on the first day of the month next ensuing his election. (Laws of 1863-4, p. 76.) It was, therefore, only by virtue of being sheriff of the county that the respondent could be also collector. In respect to the person who is to be such officer, the two offices are one and inseparable; and when he ceased to be sheriff, he also ceased to be the official collector of the county. Both offices, so far as they may be in any respect several, were necessarily vacated together when the official character of the person who held them was absolutely terminated by the ordinance, without a saving clause. His official term thereby came to an end as completely as if his term of office had expired by limitation, or as if the incumbent had departed this life. He no longer had any power to execute the functions and perform the duties of the office, either as sheriff or collector. The ordinance was the supreme law.

The provisions of the sixth article of the Revenue Act of 1855, (§§ 1 & 5,) were still in force, unrepealed by the act of 1864, and unaffected by the ordinance; and by these sections it is expressly provided that at the expiration of the term for which the several collectors were elected, (as soon thereafter as their successors shall have qualified,) they shall pay over all moneys which may be in their hands due the State, to their successors in office, and take duplicate receipts therefor; and whenever any collector shall die after he has received the tax book for any year, his legal representatives shall hand over at once to his successor, as soon as he is appointed and qualified, the tax book, and shall also pay over at once, out of his estate, all moneys which have been collected by the deceased collector, and then in his hands. There is, of course, no express provision for the particular case of an absolute termination of the office by a fundamental ordinance, changing the constitution of government itself; but the general purview and the manifest spirit and intent

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of these provisions would seem to contemplate that the same thing should take place in case of such absolute civil death of his office as if it had been occasioned by his natural death. If these laws had contemplated any other person than the *ex officio* collector, that is, the collector, who was at the same time the sheriff and therefore collector also, might perform the functions of the office after he had ceased to be such officer, or that it was a personal duty merely, and not exclusively an official function, there would have been no reason why, upon his decease, his administrator or legal representative should not have been left to fulfil those duties, and complete his unfinished business during the remainder of his term of office; and in such case there would have been no need of a successor until the time came for a new election. It is plain the statute did not view the matter in this light. It is made imperative on the legal representative, in such case, into whose hands the tax book and the public moneys might happen to fall upon the event of his decease, to deliver them over immediately to his successor, when duly appointed, and the whole unfinished business is to be completed by him.

The first section of the sixth article (R. C. 1855, p. 1362) also appears to contemplate that the power and official functions of the collector may cease with the expiration of his term of office, for it requires him to pay over to his successor all moneys in his hands belonging to the State, whose receipts are to be his discharge. Books and papers are not specially named. It may have been considered enough, so far as the interests of the State were concerned, that he should be expressly required to account for the money to his successor, rather than directly to the State Auditor and in case he retained the tax book, and continued to make collections, by virtue of his official character, it may very well be that both he and his securities would be held liable to account to the State on his official bond for all the acts he should undertake to do, and for all moneys for which he might become accountable while so acting as collector by color of office. The

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question of his liability to account to the State is one thing; that of his right and power to retain the books of his office against his successor demanding to receive them, under the operation of existing statutes and the vacating ordinance, which is the supreme command of the State itself, is quite another thing. It cannot be denied that the effect of this ordinance was much more nearly analogous to the case of his death than to that of a voluntary resignation, the expiration of his term of office, or its termination by any disqualification or incapacity; for, by the direct force of a paramount enactment of the highest authority in the State, the office was totally vacated and annulled in his person.

This construction of the ordinance and the statute concerning collectors is in harmony with the clear and express provisions of the "Act concerning public records," which declares that when any civil officer shall resign or his office be vacated, he shall deliver to his successor all records, books, and papers to such public office; and it requires any judge of the Supreme or Circuit Court, in case of his failure to do so, upon the affidavit of a credible person setting forth the facts, to issue his warrant to the sheriff or coroner, commanding him to seize all such records, books, and papers, and deliver them over at once to the proper officer. In this case the proper officer was the duly appointed sheriff of the county and *ex officio* collector. How can any judge refuse to issue the warrant when it is made to appear in this manner that a case has arisen, and that, in the very words of the act, the office in question has "become vacated," and that a successor, duly appointed, is demanding the records and books of the office to enable him to proceed with his official duties? This act might be supposed to have reference more especially to such offices as clerks and recorders, or the higher offices of the State; but there is nothing in the language or purview of the act to limit its application to civil officers of any particular description, or to the records, books, and papers, of any peculiar kind of public office. The policy of the act as well as the words would seem to contemplate all civil offi-

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cers and all public offices. If the officer had vacated the office by his own act, and abandoned the custody of the records, books, and papers, and they had fallen into the hands of a stranger or mere intruder, there would be little room for doubt on the subject; and when they are retained by a person whose official character has come to an end, it is difficult to see on what ground he is to be distinguished from a mere stranger or lawless intruder.

In some cases a sheriff may complete an act begun and substantially executed while in office, by going through with merely formal proceedings after his office expires; as, where he has levied upon goods and his office expires before a sale, he may complete the levy by making sale and bringing the money into court; "for," says Holt, C. J., in *Clerk v. Withers*, (2 Ld. Raym. 1072,) "because after the seizure of the goods, there is nothing to be done by the sheriff but to bring the money into court, though, indeed, if the sheriff pay the money to the plaintiff, that is well." But if any substantial act remained to be done, as, if a levy had not been made, or if, (as in that case,) an extent had been made, which still required an award of *liberate* to make it valid and effectual, and the office of the sheriff expires or the plaintiff dies before that is done, he cannot do it afterwards. In short, he cannot do any further new and substantial act as such officer. His powers as sheriff are at an end, and so it must be also with the *ex officio* collector. If he has made a levy of a tax, he may sell and pay the money over to his successor; if he has not, he can do nothing further in the matter but deliver over his books and papers, and his unexecuted business, to his successor in office. This case of *Clerk v. Withers* is cited by Napton, J., in *Howard v. The State*, (8 Mo. 361,) as authority for the doctrine then held, and it is enough to show that the court did not intend to go any further than this in their statement of the common law.

The case of *Howard v. State* is urged as an authoritative decision on the points involved in the present case. In that case a sheriff and *ex officio* collector had resigned after hav-

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ing received the tax book of the year, and after having given bond and security in accordance with the statute then in force, (R. C. 1835, p. 528,) and he had turned over the tax book to the succeeding sheriff. Under the statutes then existing he and his securities were held liable to account to the State for the collection of the revenue of that year. These statute provisions were materially different from those of the present revenue acts. They contained nothing like the above cited sections of article sixth of the revenue act of 1855. Under the act of 1835, the court held that the offices of sheriff and collector were only so far inseparable that "before a person can be collector he must fill the office of sheriff;" but that "the sheriff was not always collector, nor was the collector necessarily sheriff;" and that "from the first Monday in August until the first of January succeeding, the sheriff and collector are two different persons;" and further that "the sheriff cannot (by the law as it was in 1835, under which this case was determined) assume the duties of collector until after the first of January, and he continues in office as collector five months after the expiration of his office as sheriff." And it was held that under the act of 1835, when the sheriff had entered upon the duties of collector, and received for the tax books to the Auditor, that account was *prima facie* evidence against him, and could only be discharged by his paying the amount due into the treasury. At the same time the court did not doubt that he might resign his office, and by his resignation of the office of sheriff, where he filled both offices, relieve himself of the duties of collector; but that this privilege must be so exercised as not to prejudice the rights of the public or his liability to the State. As the law then stood, there was no provision by which the bond required of the succeeding sheriff would cover the tax book of that year, and the decision goes upon the ground that by the existing statute the collector was to complete the collection for the year, and that he alone would be accountable to the State for the performance of that duty. This is the whole purport of that case.

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By the act of 1864, the sheriff was to be *ex officio* collector for two years from the first day of the month next ensuing his election, and he was to give bond for the faithful performance of his duties for the two years next ensuing the first day of December thereafter; and if no ordinance had intervened there might have been some room for the opinion that he was by the statute bound to perform the duties of collector for that whole period of two years, and that he and his sureties on the bond so given might be held liable for the faithful and complete performance of the obligations so entered into with the State, and impliedly, that his powers as such collector were to continue for that purpose. But here the State herself intervenes, and by an absolute ordinance, which overrides and repeals all inconsistent statutes, puts an end to all such powers and duties of all sheriffs and *ex officio* collectors throughout the State, as completely as the natural death of the persons holding those offices could have done. The provisions of the statutes which are applicable to such case, and are not inconsistent with the operation of the ordinance, still remain in force, and they furnish the proper rule and guide for the determination of a case of this kind. According to the general principles of the common law, as laid down in *Clerk v. Withers*, applicable to sheriffs, they might still complete the formal parts of acts already substantially done, but they had no power to begin any new official acts. It may very well be true that the collector and his securities may be liable on his bond for all acts so done, and even for all acts subsequently done, under color of office; but of this matter we are not now called upon to decide. Nor can there be any doubt that the new sheriff and *ex officio* collector, who has been duly appointed under the ordinance and given the bond required by law to cover the period of his official duty, would be accountable on his bond for the tax book and all unfinished business of the office which should come into his hands or be turned over to him by his predecessor in office. The present statutes make ample provision on this subject.

We have therefore come to the conclusion that the judg-

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ment of the court below upon the facts laid before it was erroneous as a matter of law; and we are better satisfied to rest upon this conclusion, as it is probable that nearly all of the old collectors have complied with the ordinance and the laws as we have here interpreted them, and actually turned over the tax books of the year and all unexecuted official business to their several successors in office, whereby they and their securities have become liable to account to the State, and the old collectors have been discharged from any legal and just accountability further.

The other judges concurring, the judgment is reversed.

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DAVID P. DYER, Petitioner, *v.* ALONZO THOMPSON, STATE AUDITOR, Respondent.

1. *Revenue—Union Military Fund.*—When there are funds in the hands of the Treasurer for the redemption of Union Military bonds, and the Auditor has knowledge of that fact, it is the duty of the Auditor, upon bonds being presented, to calculate the principal and interest due upon such bonds and to draw his warrant upon the Treasurer for their payment, although upon a previous day bonds may have been presented and a warrant refused for the reason that there were no funds in the treasury applicable to their payment. The demands presented on any day should be taken up by the Auditor in the order they are presented, but a previous presentment on a day when there were no funds can have no effect to give any right of priority. (See *State ex rel. Werkman v. Treasurer*, 36 Mo. 49.)

Petition for Mandamus.

Currier and Dyer, for petitioner.

HOLMES, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* upon the State Auditor, praying that he may be required to compute the interest on certain Union Military bonds presented for redemption, and to draw his warrant upon the State Treasurer for the amount of principal and interest when so computed. The return of the respondent substantially admits the fact that the bonds in question were presented as in the petition

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stated, and that the computation of interest was not made, nor any warrant drawn for the amount thereof; and various reasons are also given why the same was not done. It amounted to a refusal to compute the interest and draw the warrant as demanded. It further appears that on that day there were sufficient funds in the hands of the Treasurer applicable to the payment of said bonds. It also appears that other bonds had been presented to the Auditor in like manner, on previous days, when there were no funds in the treasury applicable to such purpose, and for which warrants had accordingly not been drawn. And among the reasons given by the respondent for his refusal to draw a warrant on the bonds in question here, when so presented, it is urged that there were other bonds which had been previously presented, and were entitled to priority in the order of their presentation. It is further contended that the Auditor should be governed in this matter solely by the regular quarterly reports of the Treasurer made to him under the statute. (R. C. 1855, p. 1547, § 1, clause 5, and § 3.)

In the case of Werkman v. Bishop, (July T., 1865,) it was held by this court that before the Treasurer could be required to redeem such bonds, they must have been presented to the Auditor for a computation of the interest due on them, and that his warrant must have been drawn for the amount which the Treasurer was to pay whenever there should be any money in the Union Military fund available for that purpose. The act reads as follows: "and when there is a sufficient amount available for such redemption in the 'Union Military fund,' then the Auditor shall draw his warrant upon the said Union Military fund for the amount of such bonds and interest." (Laws of 1865, p. 61, § 1.) No doubt the quarterly reports of the Treasurer constitute one of the modes in which the Auditor is to be officially informed as to the state of the funds in the hands of the Treasurer, but it is not necessarily the only mode; and these special acts would seem to have reference rather to the actual fact than to the Treasurer's quarterly report. In the present case, the

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Treasurer had addressed an official communication to the Auditor on the very day of the presentment of these bonds by the petitioner, expressly advising him that there were at that time sufficient Union Military funds in his hands to pay said bonds in full. We think this should have been taken by the Auditor as furnishing adequate official information of that fact for all the purposes of this redemption. And such being the fact, we think it was the imperative duty of the Auditor to proceed at once to compute the interest on the bonds so presented and to draw his warrant for the amount, without regard to any presentation which had been previously made on days when there were no such funds in the treasury. The statutes make no provision for any other order of priority in these cases. If bonds be presented when there are no funds, the Auditor may refuse to act upon the presentment then made, and this is all he can do in each case. If there be such funds in the treasury when the bonds are presented, and he is officially informed of the fact, the interest should be computed at once, and warrants drawn, until the funds are exhausted ; and fairness and justice to all parties concerned would seem to require, in such case, that the demands made on any day should be taken by the Auditor in the order of their actual presentment to him on that day ; but a previous presentment on a day when there were no funds can have no effect to give any right of priority. Nor is there anything in the statutes, or in the law governing the case, which would give countenance to the idea that there was to be anything like a *pro rata* payment out of this fund. And if in any way it should happen that a warrant should be drawn beyond the amount of the fund actually in the treasury at the time, the Treasurer would necessarily refuse to pay such warrant until there should be funds on hand applicable to that purpose ; and such want of funds on hand, at the time of presentment, would be a sufficient justification for a refusal on the part of the Treasurer to pay such warrant at that time. In the case before us, we think a warrant

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should have been drawn when the presentment was made. A peremptory *mandamus* will be ordered in accordance with this opinion. The other judges concur.

Peremptory *mandamus* was also ordered to issue in the cases of State *ex rel.* Hewitt, *ex rel.* Maurice, *ex rel.* Partridge, *ex rel.* Wingate, v. Auditor, resting upon the same state of facts.

G. W. STUCKER, Plaintiff in Error, v. F. W. DUNCAN, Defendant in Error.

1. *Lands—Pre-emption—Equity.*—Hill v. Miller, 36 Mo. 182, affirmed.

Error to Callaway Circuit Court.

This was an action in the nature of a trespass, brought by Stucker against Duncan, to recover damages for timber cut on certain tracts of land described in his petition. Duncan answered denying the trespass, and set up title in himself to the said land, described as the N.W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of sec. 15, the S.W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of sec. 10, and the S. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ of sec. 9, all in township 46, range 8 west. The defendant likewise set up in his answer that he held the elder certificate of entry to these lands, and the same had been improperly cancelled by the Land officers—asserted his better equity, and asked that, notwithstanding Stucker held a patent for the lands, the title be decreed to him.

Upon the trial, plaintiff proved the cutting of some timber trees on the said land by defendant after the purchase of the same by plaintiff and before the commencement of the suit. Plaintiff read in evidence the patent conveying the land in controversy to plaintiff, dated March 1, 1860, and rested his case. Defendant then read in evidence a certificate of entry by himself, which was signed by Dallam, the Receiver at St.

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St. Louis, and dated St. Louis, Missouri, December 21, 1854. Both the certificate and the patent embraced the same parcels of land claimed by Stucker in his petition and by Duncan in his answer.

Defendant then introduced one Bowlin, who said that in 1854 he was with defendant in the neighborhood of the land in controversy when they met plaintiff, and defendant told him he had entered the land.

Plaintiff then introduced one William Stucker, who said he saw a small cabin on the land, built of round logs or poles, and perhaps ten feet square; the floor was weather-boarding plank laid down loosely, a few loose plank in the loft, no window, a door cut and an old shutter put up, and no chimney; neither did he see any place for a stove-pipe. There was an old stove with a joint or two of pipe laying on the floor. No one was living in the house at that time. It was in the year 1854. No ground had been cleared or cultivated. The defendant Duncan lived up in the prairie, on a farm, where he had lived a number of years; he had a large family; he kept the post-office at his house on the prairie. The witness was frequently at Duncan's house on the prairie, before and after he entered the land in controversy, and never missed his family from his said house. Plaintiff never lived on the land in dispute, nor ever built upon it; he owns a farm adjoining said lands; neither did plaintiff ever live upon the land.

This testimony was corroborated by the statements of another witness.

Plaintiff then offered to read in evidence certified copies of papers from the General Land Office, tending to show and actually showing the revision of Duncan's entry, and the entry or permission to enter the same lands by the plaintiff Stucker. The defendant objected to the reading of the papers in evidence, and the court sustained the objection; to which ruling of the court in sustaining the objection plaintiff duly excepted. He then offered to read in evidence the sworn statement of W. P. Selby, as found in said papers,

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(first proving the death of Selby,) to which plaintiff objected. The court sustained the objection, to which plaintiff excepted.

The plaintiff then offered to read in evidence another paper, showing that the entry of Duncan (defendant) was made under the graduation and pre-emption law of 1854, and also the evidence upon the cancellation of defendant's entry; this was objected to by defendant, and the objection was sustained by the court, and the plaintiff excepted.

Among the papers offered in evidence is a copy of the affidavit of defendant when he applied to enter the land in dispute, which showed that he (defendant) offered to enter the said land under the graduation and pre-emption law of 1854; also, a certified copy of the St. Louis Land records showing that defendant's entry of said land had been cancelled: to the reading of which defendant objected, the court sustaining the objection, and plaintiff excepting.

Plaintiff likewise offered to read in evidence a certified copy of the notice served on defendant, notifying him that plaintiff Stucker had contested his entry of the said lands, and when and where the matter would be investigated, as well as a copy of the notice of cancellation. The defendant objected also to this, which objection was sustained by the court, and the plaintiff excepted.

The testimony being closed, the plaintiff asked the court to give the following instructions, to wit:

"1. That plaintiff, having the legal title to the land upon which the trespass was committed, is entitled to recover.

"2. The Government of the United States, through its agents, has a right to vacate the entry and certificate thereof of any one whenever a fraud has been practised upon the Government through or by the person entering the same; and if a fraud was practised in the entering of the land in dispute, and the Government through or by its agent vacated the same, then the verdict ought to be for the plaintiff.

"3. If Duncan had not in good faith improved and settled upon the land in dispute, then he, in taking the oath and making the entry of said land, practised, or attempted to

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practise, a fraud upon the Government; and the Government, in consequence of said fraud, had the right to vacate the entry.

"4. If the entry of Duncan was vacated by the Government, and the lands were afterwards entered by Stucker, and he obtained a patent therefor, he holds the legal title to the same, and ought to recover in this action."

These instructions were refused by the court, and plaintiff duly excepted.

The court, at the instance of defendant, gave the following instruction :

"1. That the Register or Receiver of the Land Office had no power or authority, by virtue of his office, to sit in a judicial capacity and decide upon the validity of the defendant's entry of the land in controversy, and to rescind and cancel the contract between the United States on the one hand and the defendant on the other, and divest the defendant's equity in the land; that under the Constitution, and the acts of Congress made in pursuance thereof, there is no such judicial officer as that of Register of Lands, or Register and Receiver, and defendant's equitable title by his entry and payment of the purchase money cannot be divested by any proceedings at the Land Office which are *coram non judice* and void."

To the giving of this instruction plaintiff objected, which objection the court overruled, and the plaintiff duly excepted. A verdict was found for defendant. Plaintiff filed his motion for a new trial and sued out his writ of error.

Sheley & Boulware, for plaintiff in error.

I. The patent vested the legal title in plaintiff Stucker to the lands in controversy, and in an action in the nature of trespass, the court (whatever may have been its powers and duties as a court of equity) had no right to go behind it. (*Bagwell v. Broderick*, 13 Pet. 436; *Allison v. Hunter*, 9 Mo. 749; *Carman v. Johnson*, 20 Mo. 108.)

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II. The Commissioner of the General Land Office has the supervising control over entries of land, and in supervising an entry he acts in a judicial character or capacity, and has the legal right to vacate an entry. See act of Congress for the adjustment of suspended pre-emption land claims, and approved August 3, 1846. This act was revived and continued in force by the act of March 3, 1853, and the act of June 26, 1856. (*Barnard's heirs v. Ashley's heirs*, 18 How. 44; *Wilcox v. Jackson*, 13 Pet. —; *Lewis v. Lewis*, 9 Mo. 185.)

III. The court erred in excluding the records of the Land Office, as the same showed upon what the action of the officers was based, and that the entry was vacated; and the plaintiff had a perfect right to show that the elder certificate was obtained by fraud. (*Allison v. Hunter*, 9 Mo. 750.)

H. C. Hayden, for defendant in error.

The court below very properly excluded the various documents pertaining to the judicial investigation before the Register and Receiver of the Land Office. No such power is given to these officers, or either of them, to sit in a judicial capacity, and adjudicate land titles, and divest equitable interests, which they as the agents of the Government have been instrumental in vesting in individuals who through them purchase lands of the Government. For the like reason the court properly declared the law as contained in defendant's instruction; such proceedings being without any jurisdiction conferred by law, are *coram non judice* and void. (*Morton v. Blankenship et al.*, 5 Mo. 302; *Gillipot on demise*; *Burnes v. Manlove*, Sup. Ct. Ills., Dec. T., 1834; *Groom v. Hill*, 9 Mo. 320; *Carman v. Johnson*, 29 Mo. 84.)

LOVELACE, Judge, delivered the opinion of the court.

This is an action for trespass upon real estate. The defendant justified upon the ground of an equitable title in the real estate named in the petition. It is unnecessary to make a statement of this case inasmuch as it involves in every par-

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ticular the same issues that were decided in the case of Hill v. Miller, decided by this court at the August term at St. Joseph (36 Mo. 182); and, for the reasons given in that case, this judgment is reversed and the cause remanded. The other judges concur.

JOHN S. HARRIS, Plaintiff in Error, *v.* BERANICE F. CHOUTEAU *et al.*, Defendants in Error.

1. *Executions—Lands.*—Under the provisions of the act relating to executions, (R. C. 1855, p. 746, § 46,) the plaintiff in the execution is required to give notice to the defendant of the issue of the writ, &c., only in cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued.

Error to the Kansas City Common Pleas Court.

Douglas & Gage, for plaintiff in error.

The only question arising on the record is as to the notice required by section 46 of the "Act to regulate executions." (R. C. 1855, p. 746.) Under the facts of this case, was such notice necessary? The said section was evidently intended for the protection of defendants, who owned lands in counties other than that in which judgment was rendered. It was to prevent property being sold secretly and at a sacrifice, without the knowledge of debtor defendants. In cases where the execution issues to the same county in which the defendant is resident, no such notice is required, for the obvious reason that the process being in the ordinary course of law, the defendant is presumed to have knowledge of it. In that case the execution issues as a matter of course, and without any special directions from the plaintiff. It is done by the clerk as one of the duties of his office, and its performance is always expected by both plaintiffs and defendants. But a clerk never issues an execution to another court than his own unless he is so directed by the plaintiff. (§§ 8 & 9 Execution Act.) It is out of the ordinary course of proceeding. The

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defendant is not presumed to know anything about it. It is done at the instance of the plaintiff, and therefore, to prevent any surprise, fraud, or injustice, on the defendant, the law very properly requires notice of the execution in such cases. In the one case the issuance of the execution is the act of the law, in the other it is the act of the plaintiff. In the first case notice is not required, in the last it is. Where, then, the defendant is presumed to know that an execution has been or will be issued, no notice is required, and it is only necessary where such presumption does not arise.

Nor is a case in which the defendants at the commencement of the suit resided in the county where judgment was rendered, and the land levied on is situated, but became non-resident after the suit commenced, within the mischief, the reason, or spirit of the law. The mischief intended to be remedied was the sacrifice of a debtor's land, by sales made without his knowledge. Where he has such knowledge there can be no such mischief. The debtor himself can publish the fact, or attend the sale and compel that competition in bidding which will result in a fair sale and an adequate consideration. If he does not, it is his own neglect and he cannot complain.

Where, then, from the nature of the proceeding, the defendant is presumed to have knowledge of what county the execution is to be levied in, no notice is necessary. In such cases knowledge is notice. (2 Eq. Lead. Cas., Pt. 1, p. 115; Hobein v. Murphy, 20 Mo. 447.)

WAGNER, Judge, delivered the opinion of the court.

The only question presented in this case is the proper construction to be given to the 46th section of the "Act regulating executions." (1 R. C. 746.)

It appears from the record that one Guinotte commenced a suit against the defendants in the Common Pleas Court of Kansas City; the defendants were then all residents of Jackson county, and personally served with process. They all appeared and defended the action, and judgment was ren-

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dered against them and in favor of the plaintiff, at the June term, 1860, of the Common Pleas Court. Execution was issued on the said judgment, returnable to the then next October term of said court, and levied on the same property now in controversy here. The defendants then appealed from the judgment of the Common Pleas Court to this court, and obtained a stay of execution; and this court, at its July term, 1863, affirmed the judgment, and remitted the record, with their decision, to the court below. Execution again issued from the lower court February 8th, 1865, and was levied on the same property levied on under the first execution. The property was sold under the execution at the May term, 1865, of the Common Pleas Court, and Harris, the present plaintiff in error, became the purchaser. Subsequent to the service of process, the defendant Chouteau removed from Jackson to St. Genevieve county, where she resided at the time of the issuance of the last execution, and the sale thereunder.

At the same term at which the property was sold, the defendants appeared and filed their motion to set aside the sale on the ground that they were not residents of Jackson county, and had no notice of the sale. This motion the court sustained, and Harris excepted.

The 46th section of the execution act provides that "when real estate situated in a different county from that in which the defendant in the execution, owning such real estate, resides, is sought to be sold under execution in favor of the plaintiff therein, it shall be the duty of the plaintiff to cause a notice in writing to be served on the defendant or defendants owning the real estate, if residing in the State, stating the fact of the issuing of the same, how or to what county directed, and to what term of the court said execution is returnable." In *Hobein v. Murphy*, (20 Mo. 448,) this statute was under consideration in this court, and it was then decided that the notice of execution required to be given to a judgment debtor who is a non-resident of the county in which the

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land to be sold is situated, was not necessary in the sale of mortgaged land made under a special *fieri facias*. It is true the language of the statute is general and makes no exceptions, but strictly embraces in its words all execution sales of land situated in a different county from that in which a judgment debtor resides; but, in giving it a practical application, will a literal construction or interpretation carry out its manifest spirit and intent? We think not. To arrive at the mischief intended to be remedied, we must look at the object the Legislature had in view in passing the law. There can be no question that it was to prevent undue advantage from being taken of the debtor, and preserve his property from being sacrificed. Debtors frequently own land in other counties than that in which they reside, or in which the judgment is obtained, and the law gives the judgment creditor the right to have his execution issued to any county in the State. If the judgment creditor is so disposed he may issue his execution to a remote county, have the land of his debtor levied on and sold, and possibly buy it in at a great sacrifice, if the owner is not notified so that he can be there and protect his rights. It was to prevent this unconscionable advantage from being taken that the law was enacted. But where a party is brought into court by personal service, and judgment taken against him, and execution issued to the sheriff of the same county in which the judgment is had, he is certainly fully notified of all the proceedings. On the rendition of the judgment he may expect, as a matter of course, if the debt is not paid off and discharged, that an execution will follow; and as by law the execution will issue to the county in which the judgment is taken, without the plaintiff gives different directions, he will be impressed with full notice, and it is only when the judgment creditor gives different directions and orders his execution to another county, that he can bring himself within the operation of the mischief intended to be remedied by the law. His removal to another county after the institution of proceedings will make no difference.

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The court erred in sustaining the motion, and the judgment is reversed and the cause remanded. The other judges concur.

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WILLIAM CHRISMAN, ADMINISTRATOR OF JABEZ SMITH, Defendant in Error, *v.* JOSEPH C. IRWIN AND S. H. WOODSON, Plaintiffs in Error.

1. *Limitations—Payment.*—An allowance by a Probate Court of a demand against the estate of one of the makers of a promissory note which had become barred by the statute of limitations, and payments made upon such allowance by the administrator of the deceased maker will not deprive the other joint makers of such note of their defence of the bar of the statute.

Error to Jackson County Circuit Court.

This is a suit in attachment on a promissory note for \$2,000, dated September 20, 1847, and payable six months after date, signed by J. C. Irwin, S. H. Woodson and S. S. Bartleson. The following endorsements are on the note:

"Woodson, Irwin, and Bartleson, to Jabez Smith.—Note \$2,000, due March 20, 1847.—Allowed against estate of S. B., July 18, 1859, \$554.64, balance of his third of note.—1849, Nov. 16, by cash \$200 of S. B.—1848, Nov. 22, by cash received of Joseph Irwin & K., \$500.45; by cash received of Joseph Irwin, \$244.36.—1849, Aug. 15, by cash of Sidney Bartleson, \$200."

The suit was commenced March 19, 1864, against Irwin and Woodson, the other maker of the note, Bartleson, being dead. There was no service on the defendant Woodson, but a publication as to the other defendant, Irwin, who appeared and answered. Irwin set up the statute of limitations in bar of the action. The case was tried by the court without a jury. The evidence showed that Bartleson died in the year 1858, and that the credit of \$554.64, endorsed on the note, was for the amount allowed in the Probate Court of Jackson county against the estate of Bartleson on the 18th day of July, 1859, and was for the one-third part of said note, and

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was claimed as the proportion of the note due from said Bartleson. The defendant Irwin asked the court to declare the law to be that, as to him, the note was barred by the statute of limitations; but the court refused so to declare the law, and gave judgment for the plaintiff.

Douglas & Gage, for plaintiffs in error.

As to Irwin the statute of limitation is clearly a valid bar to the action. The payment alleged to have been made on the 18th day of July, 1859, and which it is claimed takes the case out of the operation of the statute, cannot have that effect.

I. It is not such a payment as is contemplated by R. C. 1855, p. 1053, § 14. That must be a voluntary payment. Here it is the endorsement of a judgment allowed in the Probate Court against the estate of a deceased joint maker of the note. A judgment is not a payment.

II. Even if such allowance were a payment, it was not made until after the statute had become a complete bar. The note was due March 20, 1848. It was barred March 20, 1858. Such alleged payment was not made until July 18, 1859. (*Bell v. Morrison*, 1 Pet. 373.)

III. But in this case the community of interest had been severed by the death of Bartleson, and a payment or acknowledgment by his administrator cannot have the effect to revive the debt as against Irwin. (Ang. Lim. §§ 251-2; *Root v. Bradley*, 1 Kan. 437; *Hathaway v. Haskell*, 9 Pick. 42; *Atkins v. Fredgold*, 2 Barn. & C. 23; *Slater v. Lawson*, 1 Barn. & A. 396; *Smith v. Townsend*, 9 Rich. Law, S. C. 44; *Van Keuren v. Parmlee*, 2 Comst. 523; *Shoemaker v. Benedict*, 1 Kern. 176.)

The principle on which it has been held that a part payment takes the debt out of the statute is, that such part payment admits a greater debt to be due. But the evidence in this case does not show such admission. Probably one-third of the amount due on the note against the estate of Bartleson is evidence that the creditor had agreed to collect the

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debt ratably of the several parties to the note, and such agreement will be enforced. (2 Tuck. 490; 4 Johns. 22.) Such admission, therefore, is only good against the estate of Bartleson. It cannot be good against Irwin because it did not admit a greater sum due, but embraces the whole amount due from Bartleson, and referred to that alone. (Ang. Lim. §§ 240 & 244.) This is a case of first impression in the courts of this State. The decisions in Craig v. Callaway County, 9 Mo. 836, and same case 12 Mo. 94, were made under a different state of facts, and under the limitation law of 1835, which did not contain the provisions found in the laws of 1845 and 1855.

The whole doctrine now combatted originated in the case of Whitecomb v. Whiting, decided by Ld. Mansfield, in 1781; but the authority of that case has been much shaken by more recent English decisions, and never was thoroughly acquiesced in either there or here. Many of the most respectable American courts have entirely repudiated it, and it is not recognized as an established authority, in its entire length, in any of the courts. The principle there asserted is that there is a community of interest between joint promisors, and therefore one may act as the agent of the others. Without admitting the truth of that proposition, it may be said in answer to it that the death of one of the joint promisors destroys the community of interest. The original promisors are supposed to have had confidence in each other, but it does not follow that this same confidence is to be extended to the representative of a deceased joint promisor. They do not know who may become such representative. There is no privity between them and such representative; and to say that they must have confidence in a person not then known or designated, is an absurdity. Nor can it be maintained on the ground of agency. An agent exercises a delegated authority. He cannot delegate this authority, whilst living, to any other person, unless expressly empowered to do so; much less can he transmit it to his administrator, to be exercised after his own death. His agency dies with him. *Delegatus non potest delegare.* (Ang. Lim. § 260, note 3.)

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E. B. Ewing, for defendants in error.

Our statute has made no change as to the effect of a payment by one of several joint promisors. (R. C. 1855, § 10, p. 161.) Part payment of principal or interest stands on a different footing from the making of promises or acknowledgments. (*Wyatt v. Hodson*, 8 Bing. 309.) As to the effect of an acknowledgment of one of several drawers of a joint and several promissory note, see the leading case of *Whitecomb v. Whitney*, 2 Doug. 651.)

In *Rexter, Adm'r, v. Penniman*, 8 Mass. 134, it is said where the parties are living, an admission of a promise or contract as undischarged within six years before action brought, take it out of the statute of limitations. For the same reason such an admission made by or to an executor or administrator after six years, ought to be considered as having the same effect. Part payment of a debt by the administrator of a debtor takes the debt out of the general statute of limitations, although no promise was made to pay the balance. (*Foster v. Starkey's Adm'r*, 12 Cush. 325.)

One of two makers of a joint and several promissory note having become bankrupt, the payee received a dividend under the commission on account of the note. This will prevent the other maker from availing himself of the statute of limitations in an action against him for the remainder of the note—the dividend having been received from the assignee within six years before action brought. (*Jackson v. Fairbank*, 2 H. Black, 340—a case strongly in point.) *Hunt v. Bridgham*, 2 Pick. 583; *Smith v. Ludlow*, 6 John. 268; *Shelton v. Cook et al.*, 3 Munf. 197, are strongly in point.

The case of *Whitcomb*, though formerly somewhat questioned, has been firmly established in England, (8 Bing. *supra*, and cases there cited,) and, as we have seen, has been recognized as law in Massachusetts, New York and Virginia.

There is nothing, either in law or equity, which compels one to plead the statute of limitations, either for himself or for the benefit of another, (3 Bin. 177-8,) and it has been

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decided by this court that an executor or administrator is not bound to plead the general statute of limitations.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon a promissory note against two of three joint makers, the third being dead. One of the defendants was not served with process, and the other pleaded the statute of limitations as a defence. To avoid this, the plaintiff relied upon a payment made within ten years before suit. The evidence showed that after the decease of the third maker, the note had been presented for allowance in the Probate Court against his estate, and the allowance was endorsed on the note as follows: "Allowed vs. the estate of S. B., 18th July, 1859, \$554.64, balance of one-third of the note." The note was drawn payable in six months after date, and was dated the 20th of September, 1847. Payments had been made by the deceased in his lifetime, in the year 1849, but there had been no payment by either of the other makers within ten years, and at the time of the allowance the note stood barred as against all three, unless taken out by the operation of the statute by the payments made in 1849 and before; and when this suit was begun the statute had run as against the defendants, unless the allowance had prevented the bar.

The determination of the latter point will dispose of the case. There is no express acknowledgment by the administrator of the existence of the debt, nor any new promise to pay it. He merely omits to avail himself of the statute as a defence against the allowance; the court decides that the debt is a subsisting demand against the estate, and makes the allowance, which is a judgment. He makes no voluntary payment of the note in his character of personal representative of the deceased maker. The note was joint and several under the statute. By the death of one party all community of interest between him and the other joint makers, from which any agency could be implied, had ceased to exist. The administrator was not the representative or

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the agent of the other makers for any purpose. He had no power as such to create a new debt, even against the estate, much less against the other parties. His duty was to collect the debts of the estate, and pay such demands as should be allowed against the estate, when so ordered. Between him and the defendants here there was no kind of privity.

Without undertaking to review all the authorities, which are numerous and somewhat conflicting, upon the effect of partial payments in reference to the statute of limitations, it will be sufficient to declare our opinion to be that this allowance did not revive nor continue the debt as against the other makers, nor prevent the statute running against them. (*Slater v. Lawson*, 1 Barn. & Ad. 396; *Hathaway v. Haskell*, 9 Pick. 42; *Smith v. Townsend*, 9 Pick., S. C. 44; *Ang. on Lim.* § 252; *Shoemaker v. Benedict*, 1 Kern., N. Y. 176.)

In *Craig v. Callaway* (12 Mo. 94) both joint makers were still living, and a payment of interest had been made by the surety on account of the principal debtor before the statute bar had been attached; and it is, therefore, widely distinguishable from this case. It has been held that a part payment by an administrator will be binding on the party making it, there being an implication to that effect from the peculiar provisions of the statute, and that a part payment by one of several joint contractors will bind all the rest, when the parties are living, resting on the principle that a payment by one is a payment for all, the one acting virtually as agent for the rest. (*Foster v. Starkey's Adm'r*, 12 Cush. 325; *Whitecomb v. Whitney*, 2 Doug. 651; *Wyatt v. Hudson*, 8 Bing. 309; *Craig v. Callaway*, 12 Mo. 94.) The words of the statute are that "nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person." (R. C. 1855, p. 1053, §§ 12-14.) This leaves the effect of the payment to be determined by the general law as it stood before the passage of the act, and it may reasonably be understood to mean any person who is competent in law to make such payment and thereby bind the other joint contractors,

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and one who does make such payment as his own voluntary act. We are not inclined to extend the application of this doctrine any further than these cases have gone, nor is it necessary here to give our sanction to them. In Shoemaker v. Benedict, (1 Kern., N. Y. 176,) this subject is elaborately considered, and the doctrine of the cases which have followed the decision in *Whitecomb v. Whiting* expressly overruled, Denio, J., dissenting, but agreeing with the rest of the court that such payments made by one of the joint contractors after the statute bar had run, was not binding on the other parties. We have no hesitation in concurring with that opinion thus far. Any joint privity or implied agency must then be considered as terminated. (*Bell v. Morrison*, 1 Pet. 373; *Atkins v. Tredgold*, 2 Barn. & C. 23; *Van Deusen v. Parmelee*, 2 Comst. 523.) Whether this note was barred or not at the time when this allowance was made, there was no voluntary payment made by the administrator, as the representative of the deceased party, that would have the effect, on any principle of implied agency, privity of contract, or otherwise, to create a new contract, or to continue the former liability beyond the time of the statute bar. A debt might very well be allowed by a Probate Court, the administrator merely waiving or omitting to plead the statute of limitations. The court would only have to consider whether or not the debt was a subsisting demand against the estate; and when once allowed, the demand becomes a judgment, which the administrator is bound to pay when so ordered by the court. To hold that this could take the case out of the operation of the statute as against the other parties, in reference to whom the debt had stood barred for many years, would be going far beyond any authority that has been adduced, and beyond any sound and just principles of law.

The judgment is reversed and the cause remanded. The other judges concur.

State ex rel. McMurry v. Auditor.

THE STATE *ex rel.* JAMES S. MCMURTRY, Petitioner, *v.* ALONZO THOMPSON, STATE AUDITOR, Respondent.

1. *General Assembly—Compensation—Auditor.*—The members of the General Assembly are entitled to pay only for the days they serve; and where, by a concurrent resolution of the Senate and House of Representatives, both Houses took a recess or adjourned for several days, the members are not entitled to pay during such recess. The Auditor may inquire into the legality of the Speaker's warrant.

Petition for Mandamus.

WAGNER, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* against the State Auditor. The relator states that he is a member of the House of Representatives from the county of Wayne, duly elected and qualified, and that he is entitled to compensation for his services as Representative as aforesaid in the sum of five dollars per day, according to the provisions of an act entitled "An act fixing the *per diem* and mileage of members of the General Assembly of the State of Missouri," approved Feb. 15, 1865. The relator further states that on the 10th day of January, 1866, he presented to the Auditor his account for services as a member of the House of Representatives for nineteen days, from the 21st day of December, 1865, to the 8th day of January, 1866, which account was for the sum of ninety-five dollars, properly audited by the Committee on Accounts, and attested by the Speaker and Chief Clerk of the House, and that the Auditor refused and still refuses to draw his warrant on the treasury therefor. The answer of the Auditor in substance states that there is no law authorizing him to draw the warrant, and that the relator did not serve as a member of the House during the period designated in the account; that the Legislature adjourned from the 21st of December to the 8th of January, and was not in session during the time intervening between these days.

The whole question here to be determined is the proper construction to be given to the act fixing the pay of the Gen-

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eral Assembly. But as the relator's counsel, in his brief, has raised the point whether the Auditor has any right to go behind the Speaker's warrant, and whether the same should not be held conclusive, we will state preliminarily that he has such right without there is a law making such warrant or certificate conclusive. (*State v. Hinckson*, 7 Mo. 353; *Morgan v. Buffington*, 21 Mo. 549.) The law fixing the *per diem* and mileage of the members of the General Assembly provides that the members "shall receive as compensation for their services the sum of five dollars per day for each and every day they may serve as such"; and by a concurrent resolution passed by the Senate and House of Representatives, it was resolved that the General Assembly adjourn on the 20th day of December, 1865, until the 8th day of January, 1866, to give the members an opportunity of spending the holidays with their families; and it was also provided that no member should receive mileage during the recess. It is evident that the Legislature did not consider it an adjournment in the proper sense of that word, for they are unquestionably entitled to mileage in attending an adjourned session. The plain intent and meaning was that they should take a recess, and their meeting should be a continuation of the same session.

Cushing says that Sundays and other days mentioned, being legislative days, or not according to the determination of the Assembly, they are always reckoned as a part or so many days of the session, and the members draw their daily pay for these as much as for any other days; and when it is provided in the Constitution that neither House shall adjourn for more than a given number of days without the consent of the other—that the Executive shall return a bill within a certain number of days,—these days are included in the computation. (*Cush. Law Prac. of Legis. Assem.*, § 357.) Therefore, when the Legislature is actually in session, an adjournment for the time or purposes above specified will not be sufficient to interrupt the session, and the members will be entitled to pay.

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But the question is, are the members serving as such when they adjourn the Legislature and go home to spend the recess with their families, or attend to their own private business? Can they be constructively in session in such a case, and render such service as to enable them to get pay from the State? If they can adjourn for three weeks for such purpose, why not three months as well?

We have nothing to guide us in this determination but the plain meaning and import of the act. It seems too clear for cavil; it can have but one natural or consistent interpretation. The members shall receive as compensation for their services the sum of five dollars per day for each and every day they may serve as such.

The fact is indisputable, that when they adjourn and go home to enjoy the association and companionship of their families, or it may be to attend to their mere private business affairs, they are not serving as such, so as to entitle them to pay from the State.

The peremptory *mandamus* is therefore refused. The other judges concur.

A. VAUGHN, Defendant in Error, *v.* CHAS. A. HADEN *et al.*,
Plaintiffs in Error.

1. *Securities—Contribution.*—The makers of a promissory note who have signed the same as securities are liable to the holder for the full amount of the note. Secs. 7 & 8 of R. C. 1855, p. 1456, apply only to cases where one security is sued by his co-security.

Error to Greene Circuit Court.

T. A. Sherwood, for plaintiffs in error.

The declaration of law asked by plaintiffs in error should have been given. (R. C. 1855, p. 1456, § 8.)

LEVELACE, Judge, delivered the opinion of the court.

This is an action brought by Vaughn against Haden and others to recover a balance due on a promissory note. Haden put in his separate answer, stating that he had signed

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the note as security, and that he had paid his full proportion on the same. The court gave judgment against Haden for the balance due on the note.

The only question is whether, under the statute, a security can release himself from the payee or holder of the note by paying a proportional part of the note; and we are referred to sec. 8, R. C. 1855, p. 1456, which reads as follows: "No such security shall be compelled in any action to pay more than his due proportion of the original demand; and when such security shall have previously paid any portion thereof, he shall be liable to pay only so much as the amount already paid by him falls short of his due proportion of the original demand." If this section be taken in connection with what immediately precedes it, there will be little difficulty in understanding its meaning. The 7th section of the same act provides that "when there are two or more securities in any such bond, bill or note, and any of them shall pay in money or property more than his due proportion of the original demand, such security may recover such excess, as herein provided for a security against the principal debtor." Now, if you will insert after the word "excess" in this section the words "from his co-security," all difficulty at once vanishes; and without these words being understood, the section becomes meaningless and useless, for ample remedy has already been provided for the security against the principal debtor in sections 5 and 6, and the Legislature certainly did not intend to re-enact the same remedy over in section 7. This section, then, is intended to give a security a right of action against his co-security to recover any excess which he may have paid upon the original demand; and the words "such security," as used in the eighth section, refers to such security as may be sued by his co-security according to the provisions of section seven. It has no reference whatever to an action brought by the payee or holder of the note or bill against the makers. Their liability is both joint and several, and the statute referred to cannot operate to change or alter that liability.

The judgment is affirmed. The other judges concur.

Beardslee et al. v. Boyd et al.

CHARLES BEARDSLEE *et al.*, Respondents, *v.* S. H. BOYD *et al.*, Appellants.

1. *Practice—Attorneys—Demand.*—Before an attorney can be sued for moneys collected by him for his client, there must be a demand of payment, or a failure to remit, after a reasonable time, in accordance with instructions. If the petition fail to allege such demand, it will be defective on motion in arrest of judgment.

Appeal from Greene County Circuit Court.

T. A. Sherwood, for appellants.

An attorney is not liable for money collected until demand made upon him. (Cummins v. McLean, 2 Pike, 402; Rathburn v. Ingalls, 7 Wend. 320; Taylor v. Bates, 5 Cowen, 376; S. P. Ferguson's case, 6 Cowen, 596; Staples v. Staples, 4 Greenl. 533; Satterlee v. Frazier, 2 Sandf. S. C., 141; Cooley v. Betts, 24 Wend. 203; Armstrong v. Smith, 3 Blackf. 251; 3 Mo. 316; 9 Mo. 688; 16 Mo. 525; 18 Mo. 375.) An attorney after the reception of money is only a mere *bailee*, and no recovery can be had against him until a *demand* is shown. (Ross v. Clark et al., 27 Mo. 549, and cases there cited.) There are but three things which will dispense with the necessity of a demand: 1. A denial of agency; 2. A promise to remit, and a failure to do so; 3. Setting up an offset exceeding the client's claim. In this case there was no evidence of a demand, nor of anything which could possibly dispense with, or constitute a waiver of, it.

The judgment should have been arrested. The petition does not state facts sufficient to constitute a cause of action. (Jaccard v. Anderson, 32 Mo. 188.) It shows no liability on the part of the appellant. It seeks to charge him with the reception of money as an attorney, and yet it does not contain the necessary averments to this end. It does not allege that any *demand* was made on Boyd for the money, or that he refused to pay over said money, or that any acts were done by him equivalent to a refusal, or to a waiver of demand. In the language of one of the authorities above cited, "It would be unjust, and contrary to the implied contract be-

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tween the parties, in cases like the present, to subject the agent to a suit for the money collected by him for his principal, without a previous demand."

LOVELACE, Judge, delivered the opinion of the court.

This is an action for money had and received by the defendants. The petition states in substance that the defendants owe the plaintiffs the sum of four hundred and ninety-eight dollars and fifty-five cents, with ten per cent. interest per annum from the second day of September, 1859, for money had and received by the defendants; which said money was collected by said defendants as attorneys for plaintiff in a certain cause wherein Charles Beardslee and others were plaintiffs, and James M. Morgan was defendant, in the Circuit Court of Greene county, Missouri, and which said sum the defendants have wholly failed and refused to pay plaintiffs, and for which they ask judgment, &c. The defendant Boyd answers, denying any knowledge or information sufficient to form a belief as whether he had received the money, and also claiming a set-off of one hundred and seventy-five dollars for legal advice and services in a certain case in which these plaintiffs were plaintiffs, and one James Morgan was defendant.

The facts disclosed by the evidence are substantially these: These plaintiffs, in 1859, commenced a suit by attachment against James M. Morgan; that suits were commenced at the same time by several other parties; that the defendants were the attorneys of all the attaching creditors; that while these attachment suits were pending, an order was made to sell the perishable property that had been attached, and that the sheriff, at the request of these defendants, paid the money into their hands, while the attachment suits were still pending, and that they gave the sheriff an indemnifying bond therefor; that judgments were obtained in favor of all the attaching creditors of Morgan, and there not being money enough to pay off all the judgments, the sheriff was ordered to pay it *pro rata* upon the judgments, the amount sued for being the amount apportioned to the plaintiffs.

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Upon these facts the court below found for the plaintiffs. Several errors are complained of in the record, and only one which will be noticed here. The others, we think, are either not well taken, or not saved in time.

The defendants are charged with receiving the money as attorneys; and the petition fails to allege any demand before the suit was brought, or any excuse for not making a demand, nor does the evidence show that any demand was in fact ever made. To hold an attorney liable for money collected by him as such, there must be a demand and a refusal to pay, or failure to remit, according to instructions, after a reasonable time. (*Cummins v. McLean*, 2 Pike, 402; *Rathburn v. Ingalls*, 7 Wend. 320; *Taylor v. Bates*, 5 Cow. 596. This doctrine has often been affirmed by this court. (*Cockrill v. Kirkpatrick*, 9 Mo. 688; *Evans v. King*, 16 Mo. 525.)

Defendants' instructions, then, on this subject ought to have been given, and his motion in arrest of judgment sustained.

The judgment is reversed and the cause remanded for further trial in accordance with this opinion. The other judges concur.

THOMAS J. BAILEY, Respondent, *v.* JOHN S. KIMBROUGH,
Appellant.

1. *Venue—Practice.*—Judgment reversed because the court refused a change of venue, the circuit judge having been of counsel.

Appeal from the Greene County Circuit Court.

This was an action instituted in the Circuit Court for Greene county, by respondent against appellant, on two promissory notes, on which Bailey alleged in his petition a partial payment had been made, but that Kimbrough had obtained possession of the notes by fraud, and wrongful and fraudulent representations, &c., and claimed judgment for the balance of the principal and interest due on said notes. Kimbrough

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filed an answer to this petition, denying that he obtained possession of the notes sued on by fraud, or wrongful and fraudulent representations, but that he obtained the notes fairly, honestly and lawfully, by settling the same and paying Bailey therefor to his full satisfaction, whereby all indebtedness respecting said notes was fully and completely satisfied, paid and discharged, and that Bailey thereupon surrendered and delivered said notes to defendants in token and evidence of such payment and satisfaction. Kimbrough after the filing of the answer, on the 25th of July filed an application for a change of venue, verified by affidavit, alleging as ground for a change that the judge of the court had been of counsel in the cause; which application was overruled, to which ruling defendant excepted. The cause then came up for trial by a jury on the 9th day of August. Bailey then introduced the following evidence, the petition of plaintiff, and the answer of defendant: the testimony of John L. Holland, who stated that in November, 1861, the defendant Kimbrough told him he had purchased his note indebtedness from plaintiff of sixteen hundred dollars at twenty-five cents on the dollar, and that plaintiff had then delivered up his notes. He, the defendant, said he had heard plaintiff would take that amount, and had followed him out of town and consummated the trade. Defendant said he told plaintiff that he was indebted to Wilson Hackney, and he intended to see him paid first; that then plaintiff could take his chances with his other creditors; that he would not put his property out of his hands; he believed if things went right he would be able to pay his debts. Plaintiff also introduced Jas. S. McQuirter, who stated that defendant told him about November, 1861, that he had paid plaintiff what he owed him, by giving him twenty-five cents on the dollar, with plaintiff's consent and agreement. This was all the evidence introduced by plaintiff. Defendant then introduced the pleadings as evidence, and also C. B. Holland, who stated that after the transaction above referred to, he saw plaintiff at Rolla, and twitted him with having sold his claim on defendant so low; told plaintiff he

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would have done better for him ; that Bailey expressed himself that it was the best he could do ; said half a loaf was better than no bread, and admitted he had taken between four and five hundred dollars on the entire claim, as he, Holland, understood in satisfaction of the whole claim. This was all the evidence. The jury found in favor of the plaintiff, and the court entered judgment. The defendant then filed his motion for a new trial, &c.

Krum, Decker & Lindenbower, for respondent.

Ewing & Sherwood, for appellant.

HOLMES, Judge, delivered the opinion of the court.

The record and bill of exceptions in this case are very defective in form, but enough appears to enable us to see that a judgment was rendered for the plaintiff without any evidence to support it, and when the evidence which was offered by the plaintiff tended to sustain the defence set up in the answer.

The bill of exceptions shows that an application for a change of venue was made on the day of the trial, and before a jury was called, supported by affidavit of the party, on the ground that the judge had been of counsel in the cause, and that the application was overruled. The facts do not sufficiently appear to enable us to say whether reasonable notice had been given or not, but we are inclined to think a change of venue should have been granted.

We think best to reverse the judgment and remand the case for a new trial, when the rights of the parties may be adjudicated in a more satisfactory manner.

Judgment reversed and cause remanded ; the other judges concurring.

Harrison v. Hance.

T. C. HARRISON, Plaintiff in Error, *v.* CROW HANCE, Defendant in Error.

1. *Practice—Instructions—Jury.*—It is the duty of the judge to give the jury proper instructions as to the law applicable to the facts of the case; and it is not proper to allow the jury to take with them law books from which they may determine the law for themselves.

Error to Phelps Circuit Court.

Plaintiff asked the following instructions, to-wit: 1. The court instructs the jury, that a constable is liable on his bond if he fail to make return of execution according to the command thereof, and is also liable if he makes a false return. 2. The court further instructs the jury that if they believe from the evidence that at any time while defendant had the execution in controversy, Thomas Ray had property amounting to \$150.00 in value, or upwards, they will find for the plaintiff the amount of his demand, with interest. 3. That any material allegation in the petition not specifically controverted by defendant's answer is taken in law as confessed, and evidence to disprove an allegation is irrelevant, incompetent, and should be disregarded by the jury. Which said instructions were by the court refused, to which ruling plaintiff excepted.

The court on its motion gave the following instructions, to-wit: 1. The court instructs the jury that if they believe from the evidence that Thomas Ray was the owner of property to an amount exceeding one hundred and fifty dollars, at the time Crow Hance, as constable, received the execution against him, they will find for the plaintiff to the amount of such excess. 2. Unless the jury believe from the evidence that said Thomas Ray owned property to the value of one hundred and fifty dollars, they should find the issues for the defendant. To the giving of which plaintiff objected and excepted.

Defendant's attorney, by permission of the court, read as instructions the twelfth section to the end of the second sub-

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division thereof, and the whole of the thirteenth section under the head of General Executions, (R. C. 1855,) and permitted the jury to carry out with them the said law book when the jury retired to consider of their verdict ; to which the plaintiff objected.

Ewing & Smith, for plaintiff in error.

E. B. Ewing, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This was a suit on a constable's bond. The petition, among other things, averred that Harrison obtained a judgment before a justice of the peace against one Ray, and that execution issued thereon, which was placed in the hands of Hance, as constable, and that he refused and neglected to levy the same upon the property of Ray, and that Ray had sufficient personal property out of which to satisfy the said execution.

The answer denied that Ray had sufficient property whereon to levy the execution and make the money to satisfy the same. Evidence was introduced by the plaintiff tending to show that, at the time the execution was delivered to Hance, Ray was possessor of personal property of the value of more than one hundred and fifty dollars. At the conclusion of the testimony, plaintiff asked three several instructions, which the court refused to give. In our opinion, the court committed no error in its refusal to give the instructions prayed for. The first asserts a mere abstract proposition of law, and refers it to the jury ; the second instruction is in direct conflict with the law regulating executions, and which exempts from levy and sale property to the amount of one hundred and fifty dollars, when owned by the head of a family, and only makes the excess over that value a leviable interest ; the third is liable to the same objection as the first, and is entirely meaningless as applied to the pleadings and issues in the case. The court, of its own motion, instructed the jury in substance, that if they believed from the evidence that at the time Hance had the execution Ray was the owner of property to an

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amount exceeding one hundred and fifty dollars, then they should find for the plaintiff the amount of such excess ; and that if they believed from the evidence said Ray did not own property of that value, then they should find for the defendants.

The act regulating executions, (R. C. 1855, p. 738,) declares that certain personal property therein enumerated shall be exempt from execution, or, in lieu thereof, other property to the amount of one hundred and fifty dollars may be selected. And it has been held in this court, if the debtor has not all the exempted articles enumerated he may retain such as he has, and select other property in addition which will make the whole aggregate the value of one hundred and fifty dollars. (Mahan v. Scruggs, 29 Mo. 282.) Undoubtedly it is the duty of the constable to apprise the defendant in the execution of his right of exemption, and to make the selection, and to have the articles appraised under oath by three disinterested householders, as provided by law ; but if it clearly appears that the debtor owns no property subject to levy and sale on execution, he cannot be held liable. The instructions given by the court of its motions, therefore, declares the law sufficiently favorable for the plaintiff. But the court, after the instructions had been submitted, allowed the defendant to read two sections of the statute to the jury as instructions for the defendant, and then permitted them to take the book with them to examine when they retired to consider of their verdict. This practice cannot be sanctioned or allowed. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to receive and obey the law as declared to them by the court. They have separate functions to perform, and neither can intrude or intermeddle with the peculiar province of the other. Whilst the jury are invaluable within their sphere as the appropriate triers of facts, it is not presumed that their education and habits have been such as to fit them for practically construing and determining questions of law. Hence another tribunal has been selected for that purpose. It is true Judge

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Tompkins, in *Hardy v. The State*, (7 Mo. 609,) said, "A court ought not, therefore, to allow juries to take books to find law to suit the case. But I see no impropriety in the court permitting a jury to take a law book in their retirement when the paragraph applying to the case may be separately marked out in the case of a statutory provision." But this does not meet the objection. What assurance is there that they will confine themselves to the particular paragraph or section? Is it not natural, when the book is once in their possession, that they should search for whatever light they can obtain in other places, which they may suppose has some application to the same subject? Then, again, are they sufficiently advised to apply the proper legal construction? The declaring and applying the law has been entrusted to the courts on account of the learning and qualifications of the judges, and they must not be permitted to surrender or renounce this branch of their powers to another body.

The judgment will be reversed and the cause remanded. The other judges concur.

W.M. A. GIBSON, Respondent, *v. JOHN LAIR et al.*, Appellants.

1. *Vendors and Purchasers—Equity.*—A purchaser of land with notice of the equities of a prior purchaser, takes the land subject to such equities.

Appeal from Greene Circuit Court.

This was an action commenced in the Greene Circuit Court by Gibson against Jno. Lair and C. B. Holland. The petition set forth that Lair in the year 1860, being the owner of certain real estate in Greene county, sold the same to plaintiff Gibson for \$350, and executed and delivered to plaintiff a contract in writing whereby he covenanted to convey said land to plaintiff on payment of said sum. The plaintiff thereupon took possession of said land, and erected and made thereon certain valuable improvements, consisting of a dwell-

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ing-house, &c.; that plaintiff continued to occupy said land until some time in the year 1863; that Lair left the State and went south, and has since remained there; that previous to Lair's departure, when said money became due, plaintiff entered into a further contract with said Lair to extend the time for payment, until said Lair should demand payment, unless plaintiff chose to pay said sum before demand; that plaintiff has been ready, able, and willing to pay said sum for the last two years; and that he now holds the same subject to the order of this court; that after the purchase of said land by him, the same was attached at the suit of one Gott, and after judgment obtained sold to satisfy said judgment, at which sale defendant C. B. Holland became the purchaser and that he is now in possession of said premises; that said Holland purchased with notice of plaintiff's claim. Plaintiff then asked judgment that the said contract between plaintiff and John Lair should be specifically performed, and that said Holland surrender said premises to plaintiff, and execute to him therefor a quit-claim deed—plaintiff being ready and hereby offering to specifically perform said contract on his part in all things, and to pay the purchase money on receiving the title to said premises. The petition also contained a prayer for general relief. There was publication as to Lair, and summons as to Holland; who at the return of the writ appeared and filed a motion to strike out all that portion of the petition that related to himself, which motion was overruled, and Holland excepted. Holland then filed his answer, in which he alleged a willingness to make plaintiff a deed to and surrender possession of said premises on payment to him of the purchase money and interest on said real estate; and concluded by praying the court to make the payment of said amount the condition of said defendant's giving possession of, and making a deed to, plaintiff for said real estate. At the next term a final decree was rendered, divesting said defendants of all title to said real estate, and decreeing that Holland surrender possession of said real estate to plaintiff upon demand; and on failure to so deliver possession, that a writ

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of restitution issue; that plaintiff pay the purchase money and interest into the hands of the clerk of the court, and that in default of the payment of said sum into court that this decree be held for naught, and that, after the payment of costs, the clerk of the court to retain the residue of the money in his hands, subject to the order of the court. No instructions or declarations of law were asked by either party, and the trial was by the court. Holland then filed his motion for a new trial and in arrest.

E. B. Ewing, for appellants.

Lair, by reason of the sale under execution, had been divested of title, (*Hatch v. Cobb*, 4 John. Ch. 560,) and the purchaser, Holland, taking it without notice of the prior sale, is therefore bound by no equity to give it effect. (*Shields v. Trammell*, 19 Ark. 60-1.) The petition manifestly shows no cause of action against Holland, no right to ask a decree against him for title. It is clearly insufficient to charge Holland with notice. (*R. C. 1855*, p. 1219; *Earl v. Picken*, 1 *Russell & M.* 548.) The title bond not being recorded, Holland could not be affected by it unless he had actual notice. (*R. C. 1855*, p. 364, §§ 40-1-2; *Davis v. Ormesby*, 14 Mo. 176.) The allegation being immaterial required no answer, and was not admitted by failing to answer. (*R. C. 1238*.) The form of the averment, even if the matter had been legally sufficient, is inadmissible in pleading, and appellant might well for that reason also treat it as so much verbiage. (*R. C. 1855*, p. 1238, § 46.)

After such a lapse of time a court of equity would presume the contract rescinded or abandoned. (*Ballard v. Walker*, 3 Johns. Cas. 63, 65.) The party seeking performance must show that he has not been in fault, but has taken all proper steps towards performance on his part, and has been ready, desirous, and prompt to perform; and without this a specific performance will not be decreed. (*Rogers v. Saunders*, 16 Me. 95-101.)

The matters alleged in the petition do not excuse the

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delay. (See case just cited.) The alleged understanding for indulgence in paying the purchase money was based on no consideration, and is no evidence of acquiescence on the part of Lair in the delay. In every case it will devolve on the party seeking relief in a court of equity, to account for his delay; or if any circumstance show negligence or raise presumption of abandonment of the contract, or if the land has risen in value, and he has laid by to take advantage of this, he will not be entitled to a decree. (*Brown v. Covellard*, 6 Cal. 566.)

Contracts are specifically enforced in equity, not as a right but discretionally, and this mode of relief is withheld, if the court cannot get at the whole case to do entire justice, (5 *Harring, Del.*, 74,) and will be refused when circumstances render it inequitable or improper. (*Morey v. Farmers' Loan Co.*, 4 *Kernan*, 304.)

T. A. Sherwood, for respondent.

The court very properly overruled the motion of defendant Holland to strike out all that portion of plaintiff's petition in so far as it related to said defendant. If he deemed himself improperly joined with Lair as party defendant in the action, or that the petition was insufficient, his proper course was to demur, and not move to strike out. Such a course of procedure is unknown to our practice. (*Söding v. Bartlett*, 35 Mo. 90.)

The averments of plaintiff's petition were admitted by the default of Lair, and the failure of Holland in his answer to deny them. Holland was, by his own admission, a purchaser with notice of a previous sale, and there is no doctrine better settled than that "he who takes with a notice of equity, takes subject to that equity." (*Jackson's case, Lane*, 60; 2 *Sug. Vend.* 268; *Mead v. Oney*, 3 *Ark.* 238; *Earles Brook v. Bulkley*, 2 *Ver.* 498; *Taylor v. Stibbert*, 2 *Ves. Jr.* 437; *Crofton v. Ormsly*, 2 *Scho. & Lef.* 583; 1 *Yeats*, 291.)

Under a prayer for general relief, the plaintiff will be entitled to any relief consistent with the facts set up in his pe-

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tition ; (Kelly's Heirs v. McGuire, 15 Ark. 555 ; Truebody v. Jacobson, 2 Cal. 269 ; Spucy v. Frazee, 7 Ind. 661;) and there can be no doubt that Gibson upon those facts was entitled to specific performance of the contract set forth in his petition as against the defendant. (Potter v. Saunders, 6 How.; 1 Sto. Eq. § 674; Dunbar v. Frederick, 2 Ball & Beat, 304; Farrar v. Patton, 20 Mo. 81.)

HOLMES, Judge, delivered the opinion of the court.

This was a petition in equity for a specific performance of a contract in writing for the sale of a lot of ground, and for a deed to be executed on payment of the note given for the purchase money. The purchaser was put in possession and made valuable improvements. The vendor left the State. The petition was taken as confessed against him, and the answer of the other defendant admitted all the facts which were necessary in order to entitle the plaintiff to the relief prayed for. The decree appears to have been fully warranted by the case made, and was entirely in accordance with the equity and justice of the case. The respective rights and claims of the defendants to the money can be readily ascertained and determined on a direct application by motion of the court for that purpose.

We discover no ground for reversing the judgment which has been rendered. The other judges concurring, the judgment is affirmed.

THE STATE OF MISSOURI, Appellant, v. ALBERT WILLIS,
Respondent.

1. *Criminal Practice—Indictment—Merchant.*—An indictment which charges the defendant with unlawfully dealing, as a merchant, at his place, &c., without having a license, &c., by selling, &c., although informal, is good upon motion to quash, as the defect does not affect the substantial rights of the defendant. (State v. Cox, 32 Mo. 666.)

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Appeal from Laclede Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

The indictment in this case charges that the defendant did, on the 11th day of April, 1864, "at his place occupied for that purpose, unlawfully deal as a merchant, without then and there having a license authorizing him to deal as a merchant, by then and there selling to one D. A. W. Morehouse articles of merchandise, which articles" were not, &c.

The defendant filed his motion to quash, which was sustained by the court and the State appealed.

The indictment is framed on the law of 1858-9 (Session Acts, p. 53). The first section declares that every person or co-partnership of persons who shall deal in the selling of goods, wares, and merchandise, at any store, stand, or place, occupied for that purpose, is declared a merchant." The second section enacts that no person "shall deal as a merchant without a license first obtained according to law."

Whilst the indictment is very inartificially and informally drawn, we are of opinion that it is sufficient. No indictment shall be affected for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." (R. C. 1855, p. 1176, § 27.)

The selling of goods, and dealing as a merchant without license, is the gravamen of the offence. The defendant is charged with dealing as a merchant without license, at a place occupied by him for that purpose. This fully apprises him of what he is called on to defend against, and we do not see how any injury can result to him, because the alleged offence is not described with technical legal precision. This case is not distinguishable from *State v. Cox*, 32 Mo. 566.

The judgment is reversed and the cause remanded. The other judges concur.

Bank of the State of Mo. v. Bray et al.

BANK OF THE STATE OF MISSOURI, Appellant, *v.* C. D. BRAY
et al., Respondents.

1. *Executions— Levy—Sale—Lands.*—The levying of an execution upon lands after the return day of the writ, and a sale made upon such levy, are void acts, and the purchaser takes no title; but when the levy is made during the life of the writ, the sale may be made after its return day. (R. C. 1855, p. 748; Acts 1863, p. 20, § 2.)
2. *Judgment—Process.*—Where process has been served upon a defendant, and judgment by default entered, the court cannot at a subsequent term, upon the mere suggestion of defendant, set aside the judgment upon the ground of defective service of process.

Appeal from Greene County Probate and Common Pleas Court.

E. B. Ewing, for appellant.

The court erred in setting aside the judgment. The record shows service on the respondent by delivering copy of the petition and writ to him October 6, 1862. It is not conceived how the court, in the face of the record on a mere motion, without any allegation or evidence impeaching the return of the officer, (even if it were competent to the respondent to do so in this form of proceeding,) could set aside the judgment on the ground alleged.

The motion to set aside the judgment was too late, not having been made at the term at which it was rendered. If the judgment had been taken without notice, as alleged, this would not be a mere irregularity, which could be corrected, by motion, after the term at which it was rendered; but the judgment would be absolutely void, not merely voidable.

The cause alleged for setting aside the sale and quashing the execution, is that the sale was made after the return day of the execution, and that the execution was *functus officio*. This is error. (Local Acts 1855, pp. 58-9, § 9; Session Acts, 1863, p. 20, § 2.)

WAGNER, Judge, delivered the opinion of the court.

Appellant obtained judgment against Stone and others on

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a bill of exchange, in the Probate and Common Pleas Court of Springfield, at the May term of said court, 1863. Execution issued on said judgment, returnable to the next succeeding November term, directed to the sheriff of Christian county. The sheriff levied on the property of Stone on the 4th day of February, 1864, and sold the same on the 8th day of March thereafter, when the Bank and one Davidson became the purchasers. At the May term succeeding, Stone filed his motion to set aside the sale made by virtue of the execution, and to quash the same, and also to set aside the judgment as to him for the following reasons : 1. The court had no jurisdiction of the person of the defendant, he not having been summoned ; 2. There was no legal summons issued in said case ; 3. Defendant was not served with process. And he further asked that the said sale be set aside for the following additional reasons : 1. Because it was made after the return day of the execution ; 2. That the execution was *functus officio*.

The court sustained the motion, quashed the execution, and set aside the sale and judgment ; to which action of the court appellant excepted, and appealed to this court.

It appears from the record that the *fieri facias* was made returnable at the November term of the court, 1863, and that no levy was made under and by virtue of the same until February, 1864. The writ was then *functus officio*; it had spent its force, and all proceedings under it were null and void.

The doctrine of *caveat emptor* applies in sales of this description, and the purchaser will be required at his peril to see that he purchases under an execution sufficient to give him a good title.

The act of 1863, (Session Acts, p. 20, § 2,) and the 54th section of the "Act regulating executions" (R. C. 1855, p. 748), have reference only to cases where levies have been made on valid subsisting executions ; but as here the levy was not made while the execution was in force, they cannot be invoked to support and uphold the sale.

We see no error committed in setting aside the sale ; but

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upon what ground the court went further and set aside the judgment, we are wholly unable to perceive.

The sheriff's return, as appears of record, shows that Stone was duly served with process, and for aught that appears it seems that the court took his simple statement to the contrary, and allowed it to contradict and overturn the verity of the record. It is, indeed, surprising strange how a court, in the face of the record, without any allegation or evidence impeaching the return of the officer, could set aside the judgment, as was done in the court below. We do not wish to be understood as intimating, however, that the return can be invalidated, or taken advantage of, even if false, in a proceeding of this character.

For the error of the court in setting aside the judgment, the judgment in this case is reversed and the cause remanded. The other judges concur.

THOMAS TILLER, ADMINISTRATOR OF JOHN ADAMS, Defendant in Error, *v.* MARK L. ABERNATHY *et al.*, Plaintiffs in Error.

1. *Attachment—Residence.*—Where a defendant makes provision for his family and leaves them at his residence, although he may be personally absent an indefinite period of time, attending to his business, no attachment will lie, as the law has provided the mode by which process may be served; but where he leaves the country, and places his family with a relative to sojourn, the presumption is that he has no fixed place of abode.

Error to Greene County Probate and Common Pleas Court.

T. A. Sherwood, for plaintiffs in error.

The first declaration of law asked by defendant was based on, and in conformity to, the evidence adduced, and is but an embodiment of the 53d section of the "Act concerning evidence" (R. C. 1855, p. 732). That section provides: "The place where the family of any person shall permanently reside in this State, and the place where any person having no family shall generally lodge, shall be deemed the place of

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abode of such person or persons respectively." (Brewer v. Linnaeus, 36 Me. 428; Sto. Confl. Laws, § 46.)

Can any one for a moment doubt that service by *ordinary process* could have been had on the defendant? (Drake Attach. § 42; Kingsland v. Worsham, 15 Mo. 657; 17 Ind. 424; 1 Bin. 349, note.)

As to the different methods by which the service of ordinary process may be had, see R. C. 1855, p. 223, § 7.

The defendant having once acquired a residence in Greene county, it is presumed to continue until another is acquired, *animo et facto*. (1 Bradf. 69; 2 Dutch. 207.) There was no evidence that the defendant had acquired or intended to acquire a domicile or residence (for in the sense in which these terms are used in attachment proceedings they are synonymous) in any other locality. (Stratton v. Bingham, 2 Sand. 420.)

E. B. Ewing, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff instituted suit by attachment on the 21st of May, 1864, against the defendant, alleging in his affidavit that the defendant had absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law could not be served upon him. At the return term of the writ, the defendant filed a plea in the nature of a plea in abatement, denying the absconding or absenting himself from his usual place of abode, as set out in the affidavit. The issue was tried before the court, both parties waiving a jury. The evidence showed substantially that defendant formerly resided in Greene county; that in 1859 or 1860 he removed from his farm to the town of Ebenezer, in the same county, and that in the latter part of the summer of 1861, he went with his family, consisting of a wife and two children, to his father's-in-law, where his family have ever since resided; and that he in the same year, (1861,) though at what time is not stated, joined the rebel army, and went south with them,

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and has never been back except on one occasion. The defendant asked four instructions or declarations of law, which were refused by the court, to which refusal he took exceptions in due form. The court then, sitting as a jury, found the issue for the plaintiff, and gave judgment in his behalf.

The principal question presented for determination is, whether defendant acquired such a residence by removing his family to his father's-in-law, as to make the residence of the latter his usual place of abode within the meaning of our statute, so that service of process on a member of his family would have been legal.

By R. C. 1855, p. 732, § 53, the place where the family of any person shall permanently reside in the State, shall be deemed his place of abode. The evidence in this case does not show with what intent the defendant took his family to stay with his father-in-law. One's domicil or house is in the place where he permanently resides. To constitute a permanent domicil or abode two elements are necessary—one, that of act; the other, that of intent.

Where a man makes provision for his family, and leaves them at his residence, although he may be personally absent an indefinite period of time, attending to his business, no attachment will lie, because the law has pointed out a mode by which service can be had. But where he leaves the country, and permits his family to sojourn with a relative, the presumption is that they are merely staying with the latter, and that he has no fixed or permanent place of abode. Upon the circumstances of this case, whether the defendant had such a permanent residence as to make it his usual place of abode, within the meaning of the law, was a question of fact and intent, and as the triers of the fact have found that he did not, we see no sufficient reason for disturbing the verdict. With this view of the case, we have found it unnecessary to examine the instructions in detail.

With the concurrence of the other judges, the judgment will be affirmed.

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JAMES DUNN, JR., ADMINISTRATOR OF THE ESTATE OF PRESTON B. REED, AND PATRICK EWING, Defendants in Error,
v. ROBERT C. HANSARD, Plaintiff in Error.

1. *Equity—Injunction—New Trial.*—A party who has failed to make his defence to a suit at law, and seeking the interposition of a court of equity, must show some substantial ground of relief which will bring the case under some head of equitable jurisdiction; such as fraud of the opposite party, uncontrollable accident, or mistake, unmixed with negligence or fault on his part. (*Matson v. Field*, 10 Mo. 100.)

Error to Callaway Circuit Court.

C. H. Hardin and H. C. Hayden, for plaintiff in error.

E. B. Ewing and Sheely, for defendants in error.

HOLMES, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity to restrain a judgment at law. It appears that the plaintiff Reed brought an action of claim and delivery against the defendant Hansard for the possession of a negro slave, which was seized and delivered over to him, upon his giving the usual bond, with Patrick Ewing, the other plaintiff herein, as security. This suit proceeded in the Callaway Circuit Court until a judgment was rendered against the plaintiff therein for costs, which the defendant Hansard supposed to be a final judgment, and a failure to prosecute the action. Thereupon Hansard brought a suit against Reed and Ewing upon the bond, to which they answered, setting up as a defence that the replevin suit was still pending undetermined, and the plaintiff had judgment for costs only. This judgment was reversed in the Supreme Court, (*Hansard v. Reed*, 29 Mo. 472,) for the reason that the suit had been prematurely brought, the suit in which the bond had been given not having been finally determined. In this latter suit the court below, subsequently to the supposed final judgment, granted the plaintiff leave to amend his petition, whereby the former judgment was held in *Hansard v. Reed* to have been impli-

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edly set aside and the cause reinstated in court. To this amended petition an answer was filed by the defendant, but at a subsequent term, on his motion the cause was stricken from the docket, and so far as the record shows no exception was taken by the plaintiff therein to that action of the court, and no further proceedings appear to have been had in the cause. In the meantime Hansard had dismissed his original suit upon the bond, and brought another suit thereon against the same defendants. In this suit service was made upon the defendant Ewing, but no service was had upon Reed. At the return term, as it appears by the record, leave was granted to the defendant to file an answer within sixty days before the next term, but it is not distinctly stated whether or not either defendant actually appeared by attorney or otherwise ; and at the next term thereafter, the record shows that the parties appeared by their counsel, and that there was a judgment by default, an inquiry of damages, and a final judgment rendered for the plaintiff for the sum of \$1,080, damages and costs. The present suit was instituted for the purpose of enjoining the execution of this judgment, an injunction was granted, and a final decree entered making the judgment perpetual. The decree finds as facts "that the judgment sought to be enjoined was obtained by defendant in this cause against the plaintiffs Reed and Ewing, at the April term, 1863, of this court, on a bond given by the present plaintiff for the return of a negro, which by the sheriff under writ issued by the clerk of this court, in a certain cause then pending in this court, by the children of defendant Hansard, by their curator Reed, against said Hansard, and which was commenced in 1855 ; that Reed resigned his curatorship of the wards, and the petition was amended in their name by their present curator, Jefferson F. Jones, which said suit was improperly stricken from the docket at the April term, 1861, of this court, and is in fact still pending, and so remains undisposed of at this time. The court finds that the suit on the bond in which the judgment was rendered now sought to be enjoined, was commenced on the 9th of

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February, 1861, and that the plaintiff Reed, defendant in that suit, was never served with process; that he never entered his appearance therein, or authorized any one to enter his appearance for him, and that Ewing was laboring under the belief that he had nothing to do with any suit on the bond until the said suit of the children of Hansard by their curator Jones should be determined, and that he was surprised and misled as to the nature of said suit and the judgment so rendered against him, and that he was mistaken and misled in supposing that Jones and Boulware were his attorneys, when in fact they were not; and also finds that the fact that the said judgment was rendered against him—till after the final adjournment of the court, and that he had a meritorious defence. The court further finds that there was no regular term of this court held in this county from April, 1861, till April, 1863, and that no default was taken in said cause of Hansard v. Reed and Ewing at any time till the April term, 1863, of this court, when the default was entered against Reed and Ewing, and at the same time the final judgment in the cause was rendered, and is the judgment now sought to be enjoined."

It appears in evidence that the defendant Ewing, on whom regular service was made, called upon the curator Jones, and was told that no suit could be maintained against him on the bond while the other suit was still pending, and that he gave himself no further trouble concerning it; that he had attorneys employed in other cases, but it did not clearly appear whether or not any attorney had been specially engaged to attend to this case. The record entries show that some attorney did appear, representing the parties defendant. It appears that Reed was personally present in court when the judgment was rendered, and protested against the proceedings, but took no part in them; nor did he take any action in the case afterwards. No further steps appear to have been taken in the case at law. There was no evidence to show any fraudulent action, or improper conduct, on the part of the plaintiff.

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It is quite extraordinary that under these circumstances no motion for a new trial was ever made in the case, nor any steps taken to bring the matter before the court below on motion or otherwise, for the correction of any error or irregularity in that judgment; and that the aid of a court of equity should now be invoked, not to get a new trial merely, but a perpetual injunction to restrain the party forever from any further prosecution of his cause of action. As in Matson v. Field, (10 Mo. 100,) the above statement of the case would seem to be enough to show how irreconcilable is this decree with any principle of law or equity. In that case there had been no appearance until after a judgment by default and a final judgment rendered upon an inquiry of damages at the next term afterwards; but a motion for a new trial, supported by affidavits, had been made fourteen days after the judgment was rendered. The motion was overruled, the party failing to show any such diligence, accident, or mistake, unmixed with negligence or inattention on the part of himself and his attorney, as would entitle him to a new trial, though having a meritorious defence; and this ruling was affirmed in this court in Field and Cathcart v. Matson (8 Mo. 686). The defendant then sought the aid of a court of equity by injunction, which was denied in this court in Matson v. Field, (10 Mo. 100,) and the court sanctioned the doctrine that "the interference of a court of equity in granting a new trial, arises only from the inability of the party to make his application to a court of law; for if he has made it and it has been refused, it cannot be successfully renewed in a court of equity on the same ground, and if he has failed to make it when he might have done so he is entitled to no relief;" and it was added further, that "it is obvious that if a court of equity interfere at all, it should have again permitted a litigation of the rights of the parties in a court of law." Now, if that judgment were erroneous there would be a remedy at law by writ of error, and if it were void for irregularity, or for want of service on either party, or for any other reason, there would be an adequate remedy by direct application to

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the court below. The parties have never sought any remedy whatever in the case at law. This alone would be a sufficient reason for the refusal of a court of equity to interfere for their relief. It must be something more than mere inattention, ignorance, or negligence, that has prevented the party from availing himself of his defence at law. There must be some substantial ground for relief, which will bring the case under some head of equitable jurisdiction ; such as fraud of the opposite party, uncontrollable accident, or mistake, unmixed with negligence or fault on his own part. (*Foster v. Wood*, 6 John. Ch. 89 ; 2 White & Tud. Lead. Cas. in Eq., Pt. 2, pp. 97, 102.) Nothing appears in the conduct of the plaintiff which can be held to amount to fraud ; nor does the evidence show any such accident or mistake as will furnish a ground for relief in equity. On the contrary, though there is some evidence that the parties or their attorneys were laboring under some misapprehension as to the final determination of the other suit, or as to their rights and duties in the premises, it appears, on the whole, that the result was due rather to their own negligence and inattention than to any other cause. It is clearly not a case of accident or mistake unmixed with negligence or fault on their part ; and in this respect no difference can be made between the parties and their attorneys. (8 Mo. 686.) It is not enough for a party who is regularly served with legal process, to rely upon his own vague impressions as to the nature of the suit, or upon casual inquiries and uncertain reports. Due diligence would require at least that he should place the copy served in the hands of some attorney, (if he did not propose to appear and plead in person,) and make such an engagement as would leave no room for doubt about the employment of counsel, or the responsibility which counsel assumes when so employed.

The judgment will be reversed and the petition dismissed. The other judges concur.

McDaniel et al. v. Lee et al.

WILLIAM H. McDANIEL *et al.*, Appellants, *v.* JAMES H. LEE
et al., Respondents.

1. *Securities—Judgment.*—One of several securities against whom judgment has been recovered, cannot, upon paying the debt to the creditor, take an assignment of the judgment to himself and enforce payment thereof by execution against the property of his co-sureties.
2. *Equity—Jurisdiction.*—Where a court of equity acquires jurisdiction of the subject matter, it will proceed to do complete justice between the parties.

Appeal from Christian Circuit Court.

E. B. Ewing, for appellants.

This is a proceeding by a surety, who claims to have paid the judgment, to enforce contribution from a co-surety, through an execution issued on that judgment in favor of the creditor. The answer (joint answer of all the defendants) admits that Cummins, one of the three sureties, is the assignee of the judgment, and that the amount thereof is justly due him. And it was upon this ground that he asked to be made a party defendant, and the order was made. Upon this theory the case proceeded; and the execution was enjoined as to the amount which Cummins had proved against Felton's estate—Felton being a co-surety.

Such a proceeding by a surety against a co-surety is unprecedented. Cummins after paying the judgment had a summary remedy by motion for judgment for any excess paid by him, (R. C. 1855, p. 1456,) or a remedy by *action at law*, or by bill in equity. (Pittman, Prin. & Sur. 147, 154-6.) The former is only adapted to a case which is simple and uncomplicated. For when there are several sureties, separate actions must be brought against each individual by the one who has paid the debt, to which they ought all to contribute. (*Id.*) Either an action of *assumpsit* or proceeding by bill in equity is the remedy to enforce contribution (2 Bouv. Inst. 79-81); and under our code a civil action, which would be a proceeding at law, or in the nature of a bill in equity, according to the nature of the case.

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The impropriety of such a proceeding (as that in the case at bar) to enforce contribution, is further shown by the attempt of the Circuit Court to adjust the equitable right of these co-sureties as to certain property said to have been received by Bray from the principal debtor. (*Paulin v. Kæghn*, 3 Dutch. 511-12.)

The proceeding was irregular and improper throughout. The case should have been heard and tried as a chancery proceeding; but instead it was submitted to the court sitting as a jury, and determined upon declarations of law.

LOVELACE, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity to restrain a judgment at law. The petition states that the plaintiff, C. D. Bray, is a defendant in a cause in this (the Circuit Court of Christian county, Mo.) court, entitled "James H. Lee v. N. H. Tyre, Vincent Cummins, and C. D. Bray," in which cause a judgment was rendered at the September term, 1862, for \$903.68 debt, and \$192.66 damages; that an execution issued on said judgment, dated on the 28th of March, 1865, and was delivered to said sheriff, and is now in the hands of said sheriff, to satisfy which the sheriff has levied upon certain real estate as the property of said C. D. Bray. The petition further alleges that the judgment upon which said execution issued has been fully paid to said James H. Lee, the plaintiff in said judgment. The petition then goes on to state that McDaniel is the legal owner of the real estate levied on; and prays for an injunction against the defendant's proceeding further on said judgment and execution. A temporary injunction was granted, returnable to the September term of the Circuit Court, 1865; at which time Vincent Cummins came into court and asked to be made a party defendant, which was granted. And the defendants then filed their answer, which denied that the judgment or any part thereof had been satisfied by said defendants, or any person for them; but that the same remained wholly unsatisfied and justly due to the said Vincent Cummins, as as-

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signee of said plaintiff James H. Lee; and asked that the temporary injunction be dissolved, and that they be permitted to proceed with the collection of the execution.

There was a motion made to strike out the answer of the defendants—was overruled by the court, and the cause proceeded to trial.

The evidence showed that Cummins, who was a defendant in the judgment, had satisfied the claim of Lee the plaintiff, and had procured an assignment to be made to him of the judgment; that he had had an allowance made in the county court against the estate of one of his co-defendants, who had died, of a proportional part of said payment, and was now seeking to collect his claim from his co-defendant Bray, who was his co-security on the note which was the foundation of the judgment.

On this state of facts the court below enjoined as much of the execution as had been allowed against the estate of the deceased security, and disallowed the injunction as to the balance of the execution.

The only question presented by the brief of appellant is whether a security, after a judgment is had against him with his co-securities, can pay off that judgment, and be substituted to all the rights of the plaintiff in the judgment. Prior to our statutes, a security who had paid the debt had a remedy against his co-security either by bill in equity, to force them to make contribution; or he might proceed against each separately, at law, for his proportion of the amount paid. (Pittman's Prin. & Sec. 154.) Our statutes also give greater facilities for obtaining judgment against their co-securities than existed at common law. (R. C. 1855, p. 1456, § 7.) But neither at common law nor under the statutes can a security, by simply paying the debt after judgment, without any other proceedings, be substituted to the rights of the plaintiff in the judgment, and entitled to an execution thereon. There are frequently equities subsisting between the securities that must be adjusted before an execution will be awarded in favor of one security against another.

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But in the present case the defendant Cummins claimed an assignment of the judgment to himself, and the Circuit Court so found. As to what his legal rights were as assignee, it is unnecessary here to discuss. His co-defendants have sought relief here in a court of equity, and we think that court fully competent to do ample justice in the premises. It is a well settled principle in courts of equity, that when they once acquire jurisdiction over the subject matter, they will retain it until full justice has been done between the parties. When a party is forced to come to them for relief, they will not grant a part of his remedy, and drive him to a court of law for the balance; but they will retain jurisdiction of the cause until full and ample justice has been done.

Applying these principles, then, to the case at bar, it was plainly the duty of the Circuit Court to adjust all the equities between the parties, and make the injunction perpetual as to all except that portion which ought to be paid by Bray; and to dissolve the temporary injunction, as to that portion, and order the sheriff to proceed to collect it.

The case was very irregularly tried; but it does not seem to have been conducted upon this idea; and in order that the decree may be readjusted according to the views herein expressed, the judgment will be reversed and the cause remanded. The other judges concur.

JEFFERSON G. NEWMAN, Respondent, *v.* ZADOK HOOK, Appellant.

1. *Execution—Levy—Sale.*—To pass title to personal property by a levy and sale under execution, the sheriff must actually seize the property so as to deliver the possession.
2. *Estoppel in pais.*—To constitute en estoppel *in pais*, there must be an admission inconsistent with the claim set up; an action by the other party upon such admission, and an injury resulting to him by allowing such admission, to be disproved.

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Appeal from Callaway Circuit Court.

H. C. Hayden, for appellant.

I. Both plaintiff and defendant claim title through Alfred J. Moore. The time of the sheriff's sale of the hotel is admitted. The principle that a sheriff cannot sell personal property without a seizure and taking it into possession is too well settled to admit of doubt. (*Yeddell v. Barnes*, 15 Mo. 443; 2 Bac. Abr. 734; 9 East. 474; R. C. 1855, p. 753, § 74; *Carpenter v. Stillwell*, 1 Kern. 73.)

II. It being beyond contest that the sheriff's acts passed no title, we next inquire, did A. J. Moore enter into any contract, express or implied, whereby he agreed to convey his title to this property to Newman, or any one else, either with or without a consideration moving to himself or to any one else? in other words, is there anything in the evidence which showed that he, Alfred J. Moore, transferred his right to the property? Was Moore's title the subject of a sale by anybody at any time? Did William T. Moore and B. L. Locke act as the agents of Alfred J. Moore and sell the property to Newman as the agents of Alfred J. Moore, and did Moore as the principal assent to the sale, and as principal ratify the sale to Newman? If W. T. Moore and B. L. Locke did not act as the agents of Alfred J. Moore, did not propose to sell his title, then there was nothing for Alfred J. Moore to ratify, to assent to, or to recognize. The truth is that they acted as principals in their own right, and did not assume to act in the capacity of agents for Alfred J. Moore; and the principle of the law of agency, of a ratification or subsequent recognition or assent given to acts done on behalf of another, cannot be invoked. The rule is clear, that ratification is only possible when the act done is done in the name of another, and when there has been an actual or intended agency. (*Ferry v. Taylor*, 33 Mo. 334: Sto. Ag. 258, a.; *Pittsburg R.R. Co. v. Gazzam*, 32 Penn. 347; *Debolle v. Penn. Ins. Co.*, 4 Whar. 68; 2 Amer. Lea. Cas. 572; *Chit. Cont.* 212-13; 3 Tenn. 412; 5 B. & C. 909; 10 B. & C.

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298; 5 Metc. 192; 1 Pars. Cont. 47, *w. & y.*; 6 Manning & Gr. 239, *a.*; Year Book, 7 Hen. 4, f. 35.) The court erred, therefore, in putting the case upon the assumption of an agency when there was no evidence whatever showing that W. T. Moore and Locke were acting or assuming to act as such for Alfred J. Moore. The court erred also in assuming by its instruction that Alfred J. Moore, at the time of sale, assented to this sale, of which there was no evidence.

III. The remaining and only way possible by which Alfred J. Moore could have been divested of title is by what is denominated equitable estoppel, by reason of his, A. J. Moore's, acts subsequent to the sale. Estoppels are odious in law. (1 Serg. & R. 444.) They are not admitted in equity against the truth. (Bouv. Law Dic., tit. Estoppel; Pickard v. Sears, 6 Adol. & Ell. 475.) Ld. Denman says, "the rule of law is clear that where one by his word or acts or conduct causes another to believe in a certain state of facts, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of facts." (Gregg v. Wells, 2 Perry & Dav. 296, 433; 10 Ad. & Ell. 90, 439; Stroud v. Stroud, 7 Man. & Gr. 417; Cox v. Canning, 4 M. & C. 453; 7 Mees. & W. 574; 2 Queen's B. 281, 256; 10 id. 486; 2 Excheq. 654; 2 Smith's Lea. Cas. 545, conclusion of English note; Stephen v. Bond, 9 Cow. 274; Dewey v. Field, 4 Metc. 384; 9 Wend. 147; Pickard v. Sears, 6 Ad. & Ell. 469; 19 id. 90; Bushnell v. Church, 15 Conn. 419; 17 Conn. 346; 20 Conn. 18; Hicks v. Cram, 17 Vt. 449; 1 Shepley, 130; 3 Harr. 90; Dazelle v. Odelle, 3 Hill, 219; Taylor et al. v. Zepp, 14 Mo. 488, which is approved in Vallé v. Clemens, 18 Mo. 492. See also 12 Mo. 333; 16 Mo. 114.) In the case of Taylor et al. v. Zepp, this court also admit that the doctrine of estoppel does not apply where the party doing the act, or making the admission, acted under a mistaken impression of his rights. (Whittaker v. Williams, 20 Conn. 98, 568; Steele v. Putney, 3 Shepl.; 1 Sto. Eq. §§ 385-6; Miller v. Shackelford, 4 Dana, 279; Lewis v. San Antonio, 7 Tex. 288.)

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In order to constitute an estoppel, the influence of the acts or admissions of the party must be shown to have been an immediate and direct influence. (Watkins v. Rick, 13 N. H.; Reynolds v. Louisburg, 6 Hill, 534; Casey v. Jules, 1 Gill. 430; Wallace v. Truesdale, 6 Pick. 457; Whitney v. Holmes, 15 Mass. 162; Miller v. Cresson, 5 Watts & S. 284; 9 Wend. 482; Truescott v. Davis, 4 Barb. 495; 2 Smith's Lea. Cas. 562-3; 26 Vt. 366; 24 Ala. 381; 21 Ala. 424; 2 Ohio, N. S. 551; 14 Ark. 505; Copeland v. Copeland, 21 Me. [15 Shepl.] 527; West v. Sillman, 7 Wend. 163; 10 Barb. 327; 17 Conn. 345, 355.) A mere conclusion of law does not estop. (Brewster v. Striker, 2 Coms. 19; Hunley v. Hunley, 15 Ala. 91; Carpenter v. Stillwell, 1 Ker. 73; 9 Barb. 615; 10 Barb. 98; 19 Wend. 557; 5 Den. 154; Martin v. Martin, 7 Barb. 407, 644; 8 Barb. 102.

E. B. Ewing, Hockaday and Belch, for respondent.

It is not necessary that the sheriff should be in the absolute possession of the property levied upon; the seizure is complete as soon as the goods are within the power of the officer. The officer may confide to defendant the care and custody of the property seized. (3 Rawl. 401; 16 Johns. 287, 401; 10 Johns. 287.)

It is immaterial whether the sheriff's sale divested A. J. Moore of all his property in the furniture, &c., or not; if by his act or word he induced Newman to make the purchase from William T. Moore and Benjamin L. Locke, or subsequently to said sale delivered the property to Newman in consideration of said sale, he is thereby estopped from setting up any title as against that of Newman.

LOVELACE, Judge, delivered the opinion of the court.

This action is founded upon an interpleader filed by the plaintiff Newman in a suit of attachment commenced by Hook against one A. J. Moore in the Callaway Circuit Court. The interplea claims certain personal property levied on in the attachment suit as the property of Moore. The evidence

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shows that in 1860 the sheriff of Callaway county, by virtue of divers executions against Moore, levied upon certain real estate and personal property, including the property in controversy, and sold the same. The property in question consists of certain hotel furniture then belonging to Moore, and used in a certain hotel in the town of Fulton known as the "Moore Hotel." The sheriff in his evidence says that he levied upon the "Moore Hotel" and the furniture; that he never took the furniture into possession, nor did he have it at the place of sale; that he sold the hotel and furniture at the courthouse over in the town of Fulton, and that Wm. T. Moore and one Locke became the purchasers; that he had not the property in possession at the time of the sale, nor did he deliver the possession to the purchasers either at that time or afterwards. The evidence does not show whether the property was sold along with the hotel, or whether it was sold separately, but the same parties became purchasers of all.

W. T. Moore and Locke afterwards sold the hotel and furniture to Newman the plaintiff and A. J. Moore, who up to that time it seems had been living in the hotel, pointed out the furniture, and when he moved away left this furniture at the hotel. This was substantially the evidence.

Several instructions were given and refused on both sides, and the case was submitted to the jury, who found for the plaintiff, and judgment entered up accordingly; to reverse which the case is brought here by appeal.

It will be unnecessary to notice any of the instructions given or refused on either side. There are but two questions presented by the record. First, did the sheriff's sale pass the title to the hotel furniture to Wm. T. Moore and Locke? and, secondly, if any title was left in A. J. Moore after the sheriff's sale, are those claiming under him estopped from setting up that title by virtue of the acts of A. J. Moore in pointing out this property to the plaintiff, or otherwise recognizing the validity of the sheriff's sale?

In order that a sheriff may pass title to personal property

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by virtue of an execution sale, there ought to be a levy, a sale, and a delivery of the property; and to constitute a levy under our statute, there must be an actual seizing of the property. Under the title "Executions," R. C. 1855, § 74, it is provided that the word "levy," as used in this act, shall be construed to mean the actual seizure of the property by the officer charged with the execution of the writ; and this court in the case of *Yeldell et al. v. Stemmens*, 15 Mo. 443, held that a sheriff must actually seize the property on a *fieri facias* before he can sell; and that seems to be the plain and unequivocal meaning of the statute. The evidence in this case fails to show that the sheriff was ever at the house where the property was, or that he ever saw it, or that he pretended in any way to have it under his control. It was not present when it was sold, nor did he attempt to give possession to the purchaser. It does not appear to have been sold separately from the hotel building. It was all sold at the same time and place, and to the same parties. It would be dangerous in the extreme to permit sheriffs to pass the title to personal property upon such sales as this appears to have been. The property of debtors would be sold at a ruinous sacrifice and their debts left unpaid. Purchasers would not bid freely on property that they had no opportunity of examining, and especially when the sheriff was unable to deliver possession, to obtain which might result in a law suit that would cost the worth of the property. We think it very clear that W. T. Moore and Locke acquired no title to the personal property in question by reason of the sheriff's sale. On this point, however, there was no error, for the second instruction asked by the defendant, and given by the court, correctly stated the law.

In the second place, we will examine and see whether those claiming under A. J. Moore are estopped from asserting his title by virtue of the declarations and acts of Moore. There is doubt but a party may be estopped from setting up his title to personal property when he has permitted a third person to deal with it as his own, and has encouraged strang-

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ers to believe that that third person was the owner, and these strangers acting upon this encouragement have acquired rights in the property ; then the real owner will be estopped from asserting his right against such persons as have acquired a title or an interest by reason of his encouragement, for the simple reason that it would be a fraud to permit him to assert his claim against a party who had been induced by his admissions or acts to acquire an interest in the property which he would not otherwise have done. In Darrell v. Odell (3 Hill, 219) it is laid down as the rule in cases of estoppel *in pais* that there must be, first, an admission inconsistent with the evidence proposed to be given or the claim offered to be set up ; second, an action by the other party upon such admission ; third, an injury to him by allowing the admission to be disproved. This rule was adopted by this court in the case of Taylor et al. v. Zepp, 14 Mo. 482. In the case at bar, the plaintiff, without consulting A. J. Moore, or, so far as the evidence shows, even having any conversation with him at all, purchased the hotel and furniture from W. T. Moore and Locke ; and after the purchase was perfect, so far as the evidence shows, he went to the hotel, where A. J. Moore was then residing, and Moore pointed out the hotel furniture. The question is whether this estops Moore or his creditors from asserting Moore's claim to the property. This branch of the case is purely equitable, and the issue ought to have been fairly stated to the jury. The court below, in the first instruction offered, and its own motion, tells the jury that it was necessary for Moore to consent to the sale from W. T. Moore and Locke, or recognize the same. Now, there may be a vast deal of difference between consenting to a sale before it is made or while it is being made, and recognizing the fact of the sale after it is made. If A. J. Moore had been present when the sale was made, consenting to it, and thereby disclaiming title himself and inducing the plaintiff to purchase, there would be strong reasons in the absence of fraud for estopping his creditors from setting up his title. But the mere fact that he simply acquiesces in the sale made by a stranger of his property

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ought not to conclude him from setting up his title afterwards, unless he had full knowledge of his title at the time he yielded the possession. The doctrine of estoppels prevents parties from proving the truth, because they have before that either said or acted falsehoods and third persons have acquired rights upon the faith of those falsehoods being true, and their rights cannot be destroyed by disproving these former statements. Now, what former statements did Moore make to mislead this plaintiff in his purchase?—that question, at least, ought to have been submitted to the jury. If Moore had made any former admission with regard to his title calculated to mislead the plaintiff, and that did mislead the plaintiff in his purchase by inducing him to believe that Moore had no title, then Moore's creditors are estopped, and that is the very issue the jury ought to have found. But this question was not submitted to the jury, or, at least, not properly submitted; for the instruction given by the court, and before alluded to, was calculated to induce the jury to believe that the sale would be just as binding if recognized by Moore after it was made as it would be if induced by him.

The cause is reversed and remanded for further trial; the other judges concur.

HENRY C. HAYDEN, Appellant, v. DANIEL M. TUCKER, Respondent.

1. *Equity—Nuisance—Injunction.*—Equity will interfere by injunction in case of a direct, continuing, and permanent nuisance, without compelling the plaintiff to resort to repeated actions at law. To authorize this interference, there must be such an injury as from its nature is not susceptible of an adequate compensation by damages at law, or such as from its continuance must occasion a constantly recurring grievance, which cannot otherwise be prevented but by injunction. It is only necessary that a party should establish his right in an action at law preparatory to obtaining an injunction, where a question of title is involved, or the right itself is doubtful or uncertain. A purchaser of land may have his action for the continuance of a nuisance erected before his purchase was made. The keeping and standing of jacks and stallions within the immediate view of a private dwelling is a nuisance.

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Appeal from the Callaway Circuit Court.

This suit is a proceeding commenced by injunction in the Callaway Circuit Court by Hayden against Tucker, to restrain a nuisance. A temporary injunction was applied for and granted. The nuisance consisted in the standing of jacks and stallions adjoining to the dwelling-house and premises of plaintiff—the noise of animals being heard both day and night, and the exhibitions both in the covering of mares and jennets, and also while running at large in the lots, could be seen from plaintiff's dwellings, as well also from the public highway; the trying pole and jackpit being in full view of the premises of the plaintiff, and could be seen from his windows, and also from the public highway. One of the stable lots run up parallel with, and cornered with plaintiff's front yard; and in the corner nearest to plaintiff's house, and in full view of the front of the house, was the point usually occupied by the jacks—denominated by the witnesses as "their stamping ground." Plaintiff complained that by reason of the proximity of these lots, stables, and animals, and concomitant fixtures and appliances—pit and pole—that the same was a nuisance; that he could not enjoy his property; that by the constant noise day and night, made by the jacks and stallions; the habits of such animals; their vulgar exhibitions, both in the lots, at the trying pole, and at the jackpit, the same was a nuisance which annoyed himself and family, and depreciated the value of his property to such a degree as to render it unfit for habitation, and therefore prayed that the same be perpetually enjoined.

The defendant in his answer denied that it was a nuisance; alleged that plaintiff had bought the property after the erection of the stables, and therefore had no right to complain.

The cause came on for trial at the April term, 1865, before the court, the Hon. G. H. Buckhardt presiding, upon the petition and answer, and evidence was introduced by plaintiff showing the distance and position of the stables, lots, trypole, and pit, from the dwelling-house. The evidence offered by

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plaintiff showed that plaintiff's dwelling was but thirty-seven and a half feet from the lot next to the plaintiff's house; that plaintiff's garden run down to within a short distance of the stable, jackpit and trypole, and that the whole institution and performances could be seen from plaintiff's garden, back yard, and the back windows of his house, and also from the public highway leading past the plaintiff's house, upon which public highway two of these stable lots fronted; and that the animals generally, when in the lot, stood in the corner denominated the "stamping ground," within fifty feet of plaintiff's front door, and in full view of his house; and that the stables were two hundred feet from plaintiff's house. It was also shown that the animals had been seen covering mares from the public highway. It was also proved that the lot upon which the dwelling-house was built was bought for the purpose of building a dwelling-house upon it before the erection of the stables. It was also shown that the dwelling-house and stable were erected the same year, but the stable was built first. The ell of the dwelling-house was built the same spring that the stable was erected, and the front in the fall of the year. It was shown, also, that before the erection of the dwelling-house one stallion was kept at the stable, and that three jacks and one additional stallion were brought there after the erection of the dwelling. Plaintiff also showed that the noise of the jacks was very annoying to the occupants of the house at all hours and times. By reason of the insufficiency of the fencing, the jacks would break through upon plaintiff's premises, and run up to his door.

The continuous character of the nuisance was shown by the offer of plaintiff of a certain sum, proved to be sufficient for the removal of the nuisance, and Tucker's refusal to accept.

Judgment being given for defendant, plaintiff appealed.

Dyer and Hockaday, for appellant.

There are three questions presented for the adjudication of this court.

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I. Is the keeping of jacks and stallions, and standing them to mares so near to a public highway, and to the plaintiff's dwelling, that their noise could be heard and their performances seen from the premises and dwelling-house, and the permitting them to run at large in lots annexed to the stable, adjoining to plaintiff's front yard, and within a few feet of his house, by reason of the habits of such animals—of their continual braying and noise, and obscene exhibitions and demonstrations—a nuisance? And, in addition to all this, suffering them to break through on to the plaintiff's enclosure, and come up to his very door. It is, without doubt, a physical nuisance, a moral nuisance, a public nuisance, as well also a private nuisance, by reason of the particular injury to plaintiff. The Circuit Court erred in declaring that this did not constitute a nuisance. (2 Greenl. Ev. §§ 465-66; Smith v. McConathy, 11 Mo. 517.) Anything erected so near to a dwelling-house as renders it unfit for habitation is a nuisance. (11 Mo. 523; 3 Barb. 157; 9 Paige Ch. 576; Burr. 337; 3 Black. Com. 217; Bouv. Law Dic., Tit. "Nuisance.")

Besides the noise, annoyance, and obscenity of this nuisance, the evidence showed what is true in the experience of all persons acquainted with the nature of these animals, they are dangerous at times, and have been known to kill their keepers. Hence the necessity of legislative intervention in our own State to prevent such animals running at large. (R. C. 1855, p. 849.)

II. If it be a nuisance, then what is the appropriate remedy? Should it not be such as to afford complete and adequate redress? So long as the nuisance remains, an action on the case for damages does not afford redress, because there is continued depreciation of the plaintiff's property, a continued recurrence from day to day and hour to hour of the same annoyance. Even if, in an action on the case, a jury could properly estimate the damages, the relief would be compensation for the past injury, and not indemnity for the future. It would require a multiplicity of actions which would not only subject the plaintiff to the vexation of the

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continued nuisance, (which of itself is sufficient for the interference of equity by injunction,) but also to vexatious litigation. If there is any case where a court of equity would be justified in interposing by injunction, it is a case like the present where no adequate damages could be assessed at law, and where the nuisance is not temporary but continuous. This is a criterion laid down by Judge Story in his commentaries on Equity. (2 Sto. Eq. § 927; Mitf. Eq. Pl.; Attorney General v. Nichols, 16 Ves. 338; 18 Ves. 211; 2 Myl. & C. 123; 19 Ves. 617; 3 Myl. & K. 169; 12 Simm. 416; 1 Myl. & K. 154, 181; Adams' Eq. 154, 181; Jer. Eq. Jur. p. 309, § 1; 1 McL. 355; 6 Ves. 689; 6 Barb. 152; 7 Barb. 395; 9 Wend. 571.) These authorities also show that in case of doubt, a court of equity does not dismiss the bill, but directs a trial at law, and in the meantime restrains all injurious proceedings.

As the court below decided that there was *no cause of action at all*, of course there would be no relief by an action for damages, no more than by injunction. (Coker v. Birge, 9 Geo. 425; Soltean v. Deheld, 9 Eng. L. & Eq. 104; State v. Haines, 31 Me. [17 Shepl.] 65; Howard v. Lee, 3 Sand., S. C., 281; 3 Barb. 157; 7 Barb. 395; 6 Barb. 152.)

III. There is no priority of right in the defendant to bar plaintiff's action. Upon the facts he can claim no priority. Now, for the sake of argument, assuming the facts to be true that this abominable nuisance—a foul blot upon the social refinement of the village—an insult to public decency—located upon and in full view of a great public thoroughfare, daily and hourly travelled—so admitted by his plea of confession and avoidance, and fully established by the facts—does any length of time give him, *par excellence*, the right thus to insult public decency—thus to establish a public nuisance? The law is clear that every day's continuance is a fresh nuisance, and that no length of time will legalize a nuisance. It is a continual offence.

All the authorities concur that the improvement or extension of a town or village cannot be retarded or impeded by

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offensive trades and callings, and that they must give way to the spirit of public improvement. (3 Barb. 157; 1 Den. 257-61; 3 Black. Com. 220; 2 Kern. 492; Cro. Eliz. 191; 1 Leon. 103; Staple v. Spring, 10 Mass. 74; Alexander v. Kerr, 2 Rawle.)

It is not alone a nuisance to the public, but also a private nuisance, by reason of the special damage to the plaintiff in the enjoyment of his property, and also by its depreciated value. In fact the evidence showed that it could not be comfortably used and enjoyed as a dwelling-house at all. (Milton v. Martin, 7 Mo. 307.) There can be no doubt that plaintiff, who came in under King, succeeded to all his rights. (3 Barb. 160; 15 Wend. 526; Cro. Eliz. 402.)

Sheley and Boulware, for respondent.

I. That this being (if nuisance at all) a private nuisance, the chancellor will not interfere to enjoin unless it has been erected to the annoyance of the right of appellant long previously enjoyed. It must be a case of strong and mischievous necessity, or the right previously established at law, before the party is entitled to the aid of a court of equity. (Van Bergen v. Van Bergen, 3 John. Ch. 282; Wildon et al. v. Martin, 7 Mo. 307; Lexington & Ohio R.R. Co. v. Applegate, etc., 8 Dana, 300; White v. Boothe, 7 Vt. 131; Robinson v. Pettinger, 1 Green, Ch. 57; Caldwell v. Knott, 10 Yerg. 209; Porter v. Witham, 17 Me. 292; Givin v. Melmoth, 1 Freem. Ch. 505.)

II. The property in this case being situated outside the corporate limits of Fulton, and Tucker having previously erected the stables, and used the same for standing stallions and jacks before Hayden purchased his property, and before the improvements were erected thereon, a court of equity will not interpose to abate or enjoin, although it may be a great annoyance. (Baptist Church v. U. & S. R.R. Co. 6 Ban. 318; Shields v. Arndt, 3 Green, Ch. 234; Simpson v. Justice, 8 Ired. Eq. 120; Earl of Rippon v. Hobart, 7 Cond. & Eng. Ch. 474; Dumesnil v. Dupont, 18 B. Mon. 804.)

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III. This being a case purely in equity, and triable alone by the court, the court was not bound to give any declarations of law; and if such were given, although erroneous, and others were refused, although correct declarations of law, yet the judgment of the court being for the right party, the Supreme Court will not interfere.

IV. Stables and lots in the country used and occupied for standing stallions and jacks, although contiguous to the property of another, do not in law constitute a nuisance.

V. The pleadings in this case exclude the idea of a public nuisance, and the declarations of law asked by plaintiff aluding to public nuisance were properly refused.

VI. The evidence shows that Hayden had a full knowledge of the objects and purposes to which Tucker put the stables and lots in question, as well as the location of said lots and stables, at the time, and for a long space of time prior to Hayden's purchase of his present dwelling; therefore, even if the keeping and standing stallions and jacks on said lots be a nuisance, Hayden cannot complain. (Dana et al. v. Valentine, 5 Metc. 14.)

VII. Tucker having used and occupied the lots and stables for a number of years as a place for keeping and standing his jacks and stallions, and of which Hayden had personal knowledge, the law will not permit him to purchase property contiguous thereto, and move thereon, and have said stables and lots abated as a nuisance. (Sto. Eq. J. 6th ed. § 924, and note; White v. Booth, 7 Vt.; Robison v. Pittenger, 1 Greene, Ch. 57; Reid v. Grifford, 6 John. Ch. 19.)

WAGNER, Judge, delivered the opinion of the court.

Sic utere tuo ut non alienum laedas, is a sound as well as an ancient maxim of the law. It is an established rule, as old as the common law itself, that a man should so use his property as not to injure his neighbor; and hence if one carry on a lawful trade in such a manner as to work harm or annoyance to another, he will be answerable. Thus it has been held in the old books, that if a man erects a smith's

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forge, swine-sty, lime-kiln, privy, or tallow furnace, in such close proximity to the dwelling-house of another as to render it unfit for habitation, he will be liable to an action. (Bradley v. Gill, Lutw. 29; Aldred's Ca. 9 Coke, 58; Jones v. Powell, Hut. 135; Morley v. Praquell, Cro. Car. 510.) And it is not indispensable to maintain this right of action, that the owner should have been driven from his dwelling or habitation; it is sufficient if the enjoyment of life and property has been rendered uncomfortable. (Rex v. White, 1 Bur. 387, per Ld. Mansfield.)

Nuisances are of two kinds, public and private. The former are said to be such inconvenient and troublesome offences as annoy the whole community in general, and not merely some particular person. (4 Bl. Com. 167.) The latter is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. (3 Bl. Com. 216.)

It is in many cases difficult to determine to which of these claims an alleged nuisance belongs. Many, indeed, there are which may be regarded as both public and private. Thus, if one does an act which operates injuriously to another, it will be a private nuisance for which he shall have his action for redress; but if, in addition thereto, it is detrimental to a whole neighborhood, or to the community at large, it is also a public nuisance, and the subject of criminal as well as civil prosecution. But where a person sustains some particular damage beyond the rest of the community, by a public nuisance, he may maintain his private action and seek redress in the courts. The action is founded on that inestimable principle of Christian morality which commands every man to do to others as he would have others do to him. The same great principle is recognized and enforced in the law maxims heretofore quoted; and therefore it is that acts in themselves perfectly lawful become wrongful in consequence of time, manner, or place of performing them.

It is insisted by the counsel for the respondent, that the wrong here complained of, even if it does amount to a nui-

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sance, having been established before appellant bought the property and moved to it with his family, cannot be remedied by the injunction process; that a court will not interfere to prevent or remove a private nuisance, unless it has been erected to the annoyance of the right of another long previously enjoyed; that it must be a case of strong and imperious necessity, or the right previously established at law; and in support of this several cases are cited. It is true courts will hesitate about granting injunctions in doubtful cases, and the exercise of a power will be denied except in cases of great injury where no adequate or commensurate remedy in damages is afforded at law. But the jurisdiction is undoubted, and founded on the ground of restraining irreparable mischief, or of suppressing oppression and interminable litigation, or of preventing multiplicity of suits. (2 Sto. Eq. Jurisp. § 925.) A right of action may lie against a party for a nuisance, where a court would not be justified in interfering to remove it by injunction. To authorize this extraordinary interference, there must be such an injury as from its very nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly recurring grievance which cannot otherwise be prevented but by injunction. And this remedy will be allowed where the injury is material, and operates daily to destroy or diminish the comfort and use of a neighboring house, and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation. (2 Sto. § 926.) It is only necessary that a party should establish his right in an action at law preparatory to obtaining an injunction for a nuisance, where a question of title is involved, or the right itself is doubtful or uncertain. (Irwin v. Dixon et al., 9 How., U. S., 10; Dana v. Valentine, 5 Metc. 8.) Every continuance of a nuisance is a fresh one. And this is not only true of the party first injured, but a purchaser may have his action for the continuance of a nuisance erected before his purchase was made, as an heir may have for one

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erected in the lifetime of his ancestor. (1 Ch. Pl. 77-95, 7th ed.; Beswick v. Cunden, Cro. Eliz. 402; Rosewell v. Prior, 1 Ld. Raym. 713; Shalmee v. Pultney, *id.* 276.) In Elliotson v. Feetham, (2 Bing., N. C., 134,) the plaintiff alleged in his declaration that he was lawfully possessed of a dwelling-house, in which he with his family dwelt and where he exercised and carried on the profession of doctor of medicine and physician, and that defendant being possessed of a certain manufactory for the working of iron, &c., situate near to his dwelling-house, made divers large fires, and also divers loud, heavy, jarring, varying, agitating, hammering, and battering sounds and noises, whereby the plaintiff and his family were greatly disturbed, and by means of which his premises were greatly lessened in value, and he had been prevented from exercising and carrying on his profession in so ample and beneficial a manner as he otherwise might and would have done. The defendant pleaded that they had been possessed of the said workshops, in which the noise was made, ten years before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on their trade. On demurrer and joinder the plea was held bad, and judgment given for the plaintiff,

In the Duke of Northumberland v. Clowes, cited in 3 Chitty's Black. 217, note 5, the defendant employed a steam engine in his business as a printer, which produced a continual noise and vibration in the plaintiff's apartment, which adjoined the premises of the defendant, and it was held to be a nuisance. Hight v. Thomas, (10 Ad. & El. 590,) was an action for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in and about it. Plea enjoyment, as of right, for twenty years of a mixen on defendant's land, contiguous and near to plaintiff's house, whereby, during all that time, offensive smells occasionally and unavoidably arose from said mixen. On a traverse of of a right, the defendant had a verdict. Held, that the plea was bad, and plaintiff entitled to a judgment *non ob-*

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stante veredicto, for that it did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had in fact been used to pass beyond the limits of defendant's own land. So, too, Bliss v. Hall, (4 Bing. 183,) was a case of nuisance for carrying on the trade of a candle maker on premises adjoining the dwelling of the plaintiff. The defendant pleaded that he had carried on the business in the same place of three years before the plaintiff became possessed of his messuage. Upon demurrer, Vaughn, Judge, said, "The smells and noises of which the plaintiff complains are not hallowed by prescription;" and Bosanquet, Judge, said, "The defendant has, *prima facie*, a right to enjoy his property in a way not injurious to his neighbor; but here on his own showing the business he carries on is offensive, and he makes out no title to persist in the annoyance." It is true that the cases above referred to were mostly actions at law, but we perceive no valid or substantial reason for denying the right to equitable relief in like cases. Where the injury is occasional, contingent, fugitive, or temporary, there may be sufficient grounds for withholding this strong arm of equity interposition; but where it is of continued recurrence, and constant in its nature, it is an idle mockery to turn the party over to his remedy at law. Why compel the party to commence a fresh action every day to establish each separate act of nuisance, when the whole can be finally concluded and set at rest by the chancellor on a final hearing. Why flood the courts of the country with litigation, when a plain and ample remedy is provided for avoiding it. Besides, there are some things that cannot be compensated in damages. What verdict will afford adequate remuneration to a man whose home is rendered intolerable by a revolting nuisance? whose social happiness is marred by a disgusting annoyance perpetually bringing the blush of shame to modesty and innocence? We have examined the evidence with attention and care, and we are unable to conceive how a case could be made out more clearly, going to establish a nuisance. The witnesses all concur as to the grievance complained of, and

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its immediate proximity to plaintiff's dwelling. Daily and nightly there is no intermission, and even on the Sabbath, a day consecrated to repose, quiet, and divine worship, there seems to be no abatement.

The judgment is reversed, and a perpetual injunction will be entered in this court. The other judges concur.

STATE OF MISSOURI, Defendant in Error, *v.* JOHN C. UNDERWOOD, Plaintiff in Error.

1. *Crimes—Malicious Trespass—Evidence.*—Upon the trial of an indictment for unlawfully and maliciously taking down and removing a house, evidence that the defendant removed the house at the request of one who occupied and had apparent control of the premises is admissible to rebut the malicious intent. (R. C. 1855, p. 584.)
2. *Crimes—Malicious Trespass.*—Although the defendant may have taken down and moved a dwelling-house without authority, a malicious intent must be proven, and is not to be presumed from the want of authority.

Error to Newton County Circuit Court.

The court, on motion of the plaintiff by its attorney, gave the following instructions :

1. The court instructs the jury, that, if they believe from the evidence that the defendant pulled down and removed the dwelling-house of Joseph Wood without authority, such act of pulling down and removing said house is of itself sufficient proof, in the absence of any rebutting testimony, to show that said house was pulled down and removed maliciously and wilfully.
2. That if the jury find the defendant guilty they will assess as a punishment imprisonment in the county jail not exceeding one year, or a fine of not more than five hundred dollars and not less than one dollar, or by both such fine and imprisonment.

To the giving of which said instructions the defendant then and there excepted.

The defendant asked the following instruction, which was refused :

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1. The court instructs the jury, that, unless they believe from the evidence that the defendant wilfully and maliciously pulled down a dwelling-house, or severed therefrom the material out of which the same was made, or defaced the doors or windows thereof, as charged in the indictment, the property of Joseph Wood, within one year next preceding the finding of the indictment in this cause, in Newton county, State of Missouri, they will find the defendant not guilty.

Jas. F. Hardin, for plaintiff in error.

LOVELACE, Judge, delivered the opinion of the court.

This is an indictment against the defendant for pulling down and moving a dwelling-house, alleged to belong to one Joseph Wood. The evidence showed that the defendant pulled down the house and moved it into the town of Neosho, and there put it up and was using it; that Woods' family had moved out of the house some months before it was moved, and that no person was occupying it at the time.

The defendant then offered to prove that Joseph Wood had left the neighborhood about a year and a half before the house was moved; that when he went away he left his wife and family in the house; that, several months before the house was moved, Woods' wife and family left, and left the witness living in the house, and that Woods' wife told the witness to do what he thought best with the house, and that she (witness) continued to live in the house, and then left it and told the defendant to move it into town.

This evidence was excluded by the court. The error consists in excluding this evidence and in misdirecting the jury as to the law. The evidence of this witness ought to have been admitted. It certainly went very far towards disproving malice on the part of defendant. The witness was left in possession by Woods' family, and the defendant might very innocently suppose that he had the right to control the house; and, so far from acting maliciously, he may have supposed he was doing Woods a favor by removing the house.

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The first instruction given on the part of the State was wrong. It is based upon the idea that the defendant acted without authority in removing the house; that his act was necessarily malicious. This is by no means true. He may have acted without authority officially, and yet with the best intentions in the world. He may have been intending all the while to preserve the property for Woods' benefit.

The first instruction asked by the defendant properly set out the law on this subject and ought to have been given.

On account of these errors, the judgment will be reversed and the cause remanded for further trial. The other judges concur.

JOHN R. COLEMAN, ADM'R, Respondent, *v.* BAYLESS EARLES *et al.*, Appellants, from Crawford Circuit Court.

Affirmed for want of assignment of errors and brief.

Hillman et al., for plaintiff in error.

Newton Jones, for defendants in error.

[END OF JANUARY TERM, 1866.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
FEBRUARY TERM, 1866, AT ST. JOSEPH.

WILLIAM FOWLER, Respondent, *v.* THE CITY OF ST. JOSEPH,
Appellant.

1. *Revenue—Special Tax—Sale—Lands.*—The charter of the City of St. Joseph, approved Nov. 21, 1857, authorized the mayor and councilmen to provide for the improvement of the streets, alleys, &c., and that the cost should be borne by the owners of the adjoining property, and be apportioned and charged on the adjoining lots in proportion to their fronts, in such manner as should be prescribed by ordinance. The charter further provided that the assessments made to pay for such improvements should be a lien upon the lots of the adjoining owners, and that the owners should be liable to an action as upon like liabilities contracted by themselves; and also that the lien might be enforced by a special tax, levy and sale, as well as by proceedings at law, in such manner as might be prescribed by ordinance. By ordinance of Feb. 4, 1858, the city provided for the improvement of a street in front of several lots owned by plaintiff, and directed that if the bills for such improvements were not paid within ten days after demand by the collector they should bear interest at twenty per cent., and should be placed in the hands of the city attorney to be collected by proceedings at law. Subsequent to the improvement of the street in front of defendant's property, the city passed an ordinance amending that of Feb. 4, 1858, providing that the cost of such improvements should be enforced by a special tax, a levy, and sale. Under this amendatory ordinance, the city proceeded to levy upon the lots of the plaintiff and advertised them for sale in gross,

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without instituting any proceedings at law to enforce the lien. Upon a bill filed to enjoin the defendant from making such sale—*Held*, 1. That, as the action of the defendant tended to throw a cloud upon the title of the defendant, a bill for an injunction was a proper remedy. 2. That the proceeding to enforce collection of the cost of the improvements under the amendatory ordinance by a levy and sale was void, as the ordinance was retrospective in its operations, the work having been done under the ordinance which provided for the collection of the bills by a suit at law. 3. That the cost of the improvements should be charged to each several lot according to its front, and not to several lots in gross. 4. That where party sets up a pretension to sell the land of another in such a manner as will work a divestiture of title, without judgment or judicial process, it will devolve upon him to show that he has strictly pursued the power conferring the right.—That no liberal or equitable construction can be permitted in such a case, nor any presumptions be allowed where the inevitable effect would be to deprive the citizen of his property without invoking the law of the land or the judgment of his peers.

Appeal from Buchanan Court of Common Pleas.

Vories & Vories, for appellant.

The rule of law that strictly construes the powers granted to a corporation, and requires all acts to be done in strict conformity with the provision of the act conferring the power, does not apply the construction of the ordinances passed by such corporation, and acts done by its officers in carrying out and executing a general power clearly granted, where the manner of the execution of the power is left to the discretion of the corporation. When a corporation is clearly invested with power to legislate upon a particular subject, and for a particular end, without being directed in the act to use any particular kind of legislation, then the ordinances passed by the corporation and the acts done by its officers in carrying into effect the general power granted are most liberally construed; and if they substantially follow the directory parts of such ordinances, and the end is accomplished, the acts of the corporation and her officers will be upheld by the courts. (*Taylor v. City of Carondelet*, 22 Mo. 106-12.)

The evidence in this case shows that the work was let and the contract completed, received and certified, substantially, in conformity with the charter and ordinances; and the work

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being really performed, as required by the contract, for a fair price, the plaintiff has no right to complain, and cannot have an injunction without at least tendering the amount due. (Page v. City of St. Louis, 20 Mo. 136; Risley v. City of St. Louis, 34 Mo. 404; City of St. Joseph v. Anthony, 30 Mo. 537; City of St. Louis to use, &c., v. Hardy, 35 Mo. 264.)

The plaintiff had no right to an injunction if the taxes were legally assessed and unpaid, as in such case he had a plain remedy, and could have prevented any irreparable damage done to the property by the payment of what was really due.

The approval of the form of the bond given for the execution of the work, and the endorsement thereof on said bond, and the filing of said bond with the city register, were directory acts prescribed by ordinance for the protection of the city in the faithful execution of the contract; and if the contract was faithfully executed and performed and the work received, the plaintiff is not injured and has no right to complain.

The evidence shows that the work was well done, and done for a fair price, and substantially in conformity with the law and ordinances governing the same, and that the city was following her legitimate right to collect the debt assessed therefor against plaintiff, and the court below ought to have found in favor of defendant.

The sale was advertised in substantial conformity with the law and ordinances, and plaintiff does not pretend that he would be injured by any defect in the advertisement.

The ordinance making the cost of work to be done a special tax, and authorizing the adjoining property to be advertised and sold for the collection thereof, only applied to the remedy used to collect money already due and to become due for taxes, and did not affect or change the obligation of the contract in any way whatever. It is therefore valid and binding, not being in conflict with any ordinance or law, or with the constitution of this State or of the United States. (Lessee of Buckley v. Osborne, 8 Ohio, 181.)

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Woodson & Jones, for respondent.

We hold that this court must affirm the decree of the inferior court upon the following grounds:

I. Because the appellant is a corporation and can exercise no power that is not expressly granted to it by the terms of its charter, or by necessary implication; and that in the exercise of its powers it must act in strict conformity with the law of its creation. (*Head v. Providence Ins. Co.*, 6 Curt. Cond. U. S. 463-4; *Perrine v. Chesap. & Del. Canal Co.* 18 id. 82; *Beaty v. Knowles' Less.* 9 id. 40; *Doe v. Chum*, 1 Blackf. 336; *Blackw. Tax Tit.* 525.)

II. In all cases in which it is sought to sell land for the nonpayment of taxes, a strict and *literal* compliance with the law must be shown on the part of *all* having any duty to perform in connection with the matter. (*Thatcher v. Powell*, 6 Wheat. 119; *Williams v. Peyton's Lessee*, 4 Mo. 74; *McLurg v. Ross*, 4 Curt. Cond. U. S. 582; *Blackw. Tax Tit.* 46-7; *Early v. Doe*, 16 How. U. S. 610; *Doughty v. Hopes*, 3 Den. 595; 9 Cranch, 64; 6 Mo. 74-5; *Reed v. Morton*, 9 Mo. 878; *O'Brien v. Coulter*, 2 Blackf. 421; *Mason v. Frunson*, 9 How. 248; *Jackson v. Esey*, 7 Wend. 148; 4 Hill, 86; *Smith v. Hillmore*, 1 Seam. 333.) All of the facts connected with the assessment and collection of the tax must be ascertained to exist before the power to sell attaches. (*Blackw. Tax Tit.* 37-8; *Thatcher v. Powell*, 6 Wheat. 119; *Tallman v. White*, 2 Comst. 70; *Hughes v. Howe*, 2 Hamm. 231; *Farnam v. Buffum*, 4 Cush. 267; 6 Mo. 64; 17 Mo. 161.)

III. The defendant and its agents seek to sell plaintiff's property, and deprive him thereof, when defendant admits, in its answer to the amended petition, that its agents have not complied with the law or ordinances regulating the sale of real estate for the nonpayment of costs assessed for improvements adjoining the property sought to be sold.

In the first place, an assessment of the property to be taxed must be made. A listing and valuation of the land for tax-

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ation must be made within the time and in the manner required by law to render a tax title valid. This is a prerequisite which cannot under any circumstances be dispensed with. (Blackw. Tax Tit. 113-14; Isaacs v. Wiley, 12 Vt. 677; 9 Ohio, 93.) In this case certain of these prerequisites required by the city ordinances or charter have not been complied with.

Appellant insists that these regulations in the charter and ordinances are simply *directory*; but we hold that every requirement of the law, whether substantial or merely formal in its character, and having the semblance of benefit to the owner, which the Legislature have said shall attend the execution of the power, ought to be strictly observed by the officer entrusted with its execution, or no title will pass by the sale. (Blackw. Tax Tit. 81.)

The foregoing requirements of the charter and ordinances might be regarded as simply directory in a suit for the recovery of the costs of the work; but we deny that such is the case in a proceeding to recover land sold for taxes, or in a case like this one. (8 Port. 104; Yancy v. Hopkins, 1 Minor, 171; Br. Bank v. Bates, 2 Minor, 688 et seq.; Reed v. Morton, 4 McLean, 211.) The authorities all agree that no step in the entire proceeding, from the ordering of the work to be done down to the divestiture of the title of plaintiff, that was required by law, and that even had the semblance of advantage to plaintiff, can be dispensed with.

IV. Because the appellant was seeking to sell plaintiff's property to pay for costs that had never been made out and properly assessed under the amended charter against it, and consequently without any legal authority for so doing.

The ordinance prescribing the mode that is in force at the time the work is done, and payment demanded, is the only one that can prevail. When this work was done, and payment for doing it was refused by the defendant the law provided that before payment could be coerced suit must be brought, and a verdict of a jury and judgment of a court of competent jurisdiction had. In other words, the

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individuals charged with the work had the right to a trial by a jury before they could be compelled to pay for the work, and upon that trial they had the right to show that the work had not been done, or, if done, not well done; that they had been injured by the agents of defendant, by the manner in which such agents had discharged their duties. These were subsisting, legal, constitutional rights pertaining to the plaintiff at the time they refused to pay for the work. They cannot be deprived of those rights by virtue of the ordinance of October 27, 1859. The right of trial as it existed at common law is guaranteed by the constitution of the State, and that same constitution expressly provides that no one shall be "deprived of life, liberty, or *property*, but by the judgment of his peers, or the law of the land." (See Mag. Charta; Vorgunt v. Waddle, 2 Yerg. 270; Burger v. Carter, 1 McMullen, 114; 5 Webst. Works, 487; Taylor v. Porter, 4 Neill, 146.) The phrase "law of the land" is well defined by the authorities here cited. We hold, then, that the amended charter of the defendant is unconstitutional and void so far as it attempts to confer the power of disposing of the property without suit; 1st, because it is violative of the letter and spirit of the constitution of the State; it deprives individuals of their property without trial, or an opportunity being afforded to be heard in vindication of their rights. We hold that no ordinance passed after the work was done can affect the rights existing at the time it was done.

So, too, we maintain, that whenever lands or town lots are sold by a public officer—or, in other words, in all forced sales—the lands have to be sold in lots according to the legal subdivisions thereof, and all town lots separately, unless peculiar circumstances forbid such a course. This has been settled in many cases by our own Supreme Court. (Blackw. Tax Tit. 324; Haydon v. Foster, 13 Pick. 492.)

Corporations must conform to the mode and manner of levying and collecting the tax prescribed by their charters, which constitute their organic law. (Kemper v. McClelland, 19 Ohio, 324; Hope v. Dedrick, 8 Humph., Tenn.) The

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power is a limited one, and must be strictly pursued and strictly construed. (*Nicholl v. Nashville*, 9 Humph. 252; *Bergen v. Clarkson*, 1 Halst., N. J. 352; *City of Washington v. Pratt et als.* 8 How. 681, & 5 Curt. Cond., S. C. 538.)

WAGNER, Judge, delivered the opinion of the court.

By the amended charter of the City of St. Joseph, approved November 21, 1857, power was given to the mayor and councilmen of said city to macadamize, pave, and otherwise improve and keep in repair, the streets, alleys and avenues in the city limits; and it was provided that the cost of all macadamizing, paving and repairing, done in any street, alley or avenue by order of the mayor and city council, should be borne by the owners of the adjoining property, and should be apportioned and charged on the adjoining lots in proportion to their front, in manner to be described in ordinance, and should be paid by the owners of such lots respectively; and the city engineer should make out and hand to the city collector for collection, on the first Monday in May and November in each year, the account of such apportioned costs of the improvements made during the six months preceding, and the owners of lots charged therewith should be bound to pay said costs charged like liabilities contracted by themselves, and might be sued therefor accordingly; and the lots or lands charged should also be held by a lien for the respective apportioned share of such cost, until the same, with all the costs attending the collection, be fully paid. And it was further provided, that such lien might be enforced by a special tax, levy and sale, as also by proceedings at law, all according to such proceedings and in such manner as might be prescribed by ordinance; and any share of such costs which should not be paid at the time the same was made payable by ordinance, should until paid bear and be chargeable with such rate of interest as the city council might ordain, not exceeding twenty per centum per annum.

In pursuance of this power, the city authorities by an ordinance approved February 4, 1858, provided that whenever

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they should order any street, alley or avenue to be improved, the city engineer should let out the contract for the same, and the cost of such improvement should be assessed against the owners of the property fronting thereon, and the cost of the improvement provided for should be borne by the owners of property adjoining such improvements, and should be apportioned and charged to the adjoining property by the city engineer according to the front feet of each owner.

By section 3d, the city engineer, in each year, on the first Monday of May and November, was authorized to make an apportionment of the cost of such improvement amongst the owners according to the number of front feet fronting thereon, and make out and certify to the bills against each person charged, and deliver the same to the city collector and take his receipt therefor; and the city collector was to present said bills for payment to the person or persons charged, or to his or their agents, within five days after receiving the same. And by section 4, it was declared that if said bills be not paid within ten days after demand made by the collector, as provided in the third section of the ordinance, the collector should deliver the same to the city attorney, who should commence suit thereon; and said bills should, until paid, bear interest at the rate of twenty per cent. per annum from the time they were payable.

By an ordinance amendatory of the foregoing ordinance, approved Oct. 27, 1859, it was provided that such improvements should be apportioned and charged to the adjoining property, by the city engineer, according to the front feet of each owner, and that the amount so apportioned should constitute a special tax on the property, and be paid by the owner; and if the said bill or special tax was not paid within ten days after demand, interest was to be paid at the rate of twenty per cent., and the collector was to proceed to collect the same as in the case of other unpaid and delinquent taxes on real estate which authorized a levy and sale without suit. And it was made to apply to all macadamizing, guttering, paving, and other improvements of the streets, alleys and

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avenues of the city, done by order of the mayor and city councilmen after the first day of January, 1858, and for the costs of which suit had not been brought, as well as that which should be done thereafter.

The ordinance establishing and regulating the engineer's department, approved December 10, 1857, provided, among other things, that all public works ordered by the city should be let out by the city engineer to the lowest and best bidder, and that notice of such letting should be given for two weeks in some newspaper employed by the city, in which the nature of the work, the place where the specifications might be seen, and the time when the bids would be received, were to be stated. The performance of all contracts was to be secured by at least two sufficient securities, and all contracts, after being drawn up, were to be submitted to the city attorney for his approval of the form thereof, which approval he was to endorse on the contract, and it was then to be filed with the city register; the city engineer was to certify to the account of the contractor who had finished and completed his work according to contract, but was not to certify when he had failed to perform his contract.

The contract for the work in controversy was made in pursuance of the ordinance of February 4, 1858, and the work and labor performed under the operation of that ordinance; but the proceeding for coercing the payment for the labor is attempted under the amendatory ordinance of October 27, 1859.

The petition charges that the work done upon the street and charged to plaintiff is for the payment of the assessment, or costs, of which his lots were advertised for sale, was not let to contract as required by law; that it was not let to the lowest and best bidder, nor was notice of it published in a paper as required by law; that the performance of the contract, secured by two sufficient securities, was not approved by the mayor; that it was not submitted to the city attorney for his approval of the form, nor was his approval endorsed thereon; that it was not filed with the city regis-

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ter, nor was its correctness certified to by the city engineer. And the petition also charges that, when the work was done, the city was not authorized by any ordinance or law to advertise and sell property to pay for improvements made upon the streets adjoining or otherwise; and that at the time the work was done, and plaintiff refused to pay for the same, the costs of such work were not a special tax upon the lots advertised for sale.

The answer admits that the right to sell the lots by the city collector is claimed alone under the amendatory ordinance; and it is further admitted by the defendant that all the requirements of the ordinances were not strictly complied with, but it is claimed that these were mere formalities, and that the plaintiff was not injured by the noncompliance.

The law we regard as settled in this State, that a substantial compliance must be shown with the ordinances or by-laws to authorize a municipal corporation to recover for assessments or improvements; but a strict observance of all the formalities prescribed by the ordinances, which are merely directory in their character, will not be required.

If the power or authority has been pursued substantially, and the neglect is of matter which is only formal, and could not work injury to the other party, it will not vitiate or defeat the proceedings. The defendant resisting the enforcement of the claim is always at liberty to show that there has been a neglect of duty on the part of the authorities entrusted with the execution of the work, and if such neglect has injured him it will constitute a defence. (*City of St. Joseph, v. Anthony*, 30 Mo. 537—affirmed in *Risley v. City of St. Louis*, 34 Mo. 404.)

This is the rule when the parties are contesting their claims in an action at law for the contract price of the work, and where each can be heard and have their respective rights determined by a legal tribunal; but where a party sets up a pretension to sell the land of another in such a manner as will work a divestiture of title without judgment or judicial

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process, it will devolve on him to show that he has strictly pursued the power conferring the right. It is a high prerogative of sovereignty, derogatory of the common law, and the execution of the power should be strictly pursued and procured.

Every statute in derogation of the rights of property, or that takes away the estate of the citizen, ought to be construed strictly. No liberal or equitable construction can be permitted in such a case, nor are presumptions to be allowed where the inevitable effect would be to deprive the citizen of his property without invoking the law of the land, or the judgment of his peers. But we will not stop to inquire whether the plaintiff was injured by the neglect of the city in failing to comply strictly with every formal requisite of the ordinance as to the mode of advertising, having the contract approved by the city attorney, and the same with the endorsement thereon filed with the city register.

The amended charter prescribes that the burden of making the improvements shall be borne by the owners of the adjoining property, and shall be apportioned and charged on the adjoining lots, in proportion of their fronts, in manner to be declared by ordinance. It is not shown that any such apportionment and charge was made within the meaning of either the act or ordinance. Certainly the advertisement offering the property for sale is not sufficient, for that simply states that so many lots will be sold for a certain sum in gross. We entertain no doubt about the proper construction to be placed upon the amended charter, and that is, that the amount should be apportioned and charged to each lot separately according to its respective front, and that the advertisement should conform to the charge and apportionment. Each lot should properly stand encumbered with no more than the charge assessed against it, and the lien on each should be several and distinct. Any other construction would be productive of mischief and inconvenience.

The 15th section of the ordinance under which this proceeding to sell is sought to be enforced, gives the person

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whose real estate is sold the right to redeem within two years, upon payment to the purchaser the amount paid with interest and costs; and Mr. Justice Johnson, in Corporation of Washington v. Pratt (8 Wheat. 682), in delivering the opinion of the Supreme Court on a question identical with the present one, said, that it resulted "not less from the provisions of this 8th section, which gives the right of redeeming severally, than from the consideration that, in case of a partial sale by the proprietor of many lots, the purchaser from him would not, by the act of transfer, hold his purchase disengaged of its own particular taxes, either absolutely or upon the contingency of the remaining lots of his vendor being adequate to the satisfaction of the taxes due on the whole. Nor would a purchaser of a single lot hold his purchase encumbered with the taxes due on the whole mass of lots held by his vendor. Each would have the right to redeem upon paying the taxes assessed on his own particular purchase, and would hold his purchase subject to such taxes."

Again, when the contract was made and the work executed, the law in force did not make the amount apportioned a special lien on the property, but only created a personal liability to be enforced by an action at law. It is contended by the counsel for the appellant, that the law under which the sale was attempted only changed the remedy, and was therefore not obnoxious to any objection. But we cannot subscribe to this. We cannot concede to this law validity and force, in this particular case, without making it retrospective and doing violence to well established landmarks. Under the law existing at the inception of the plaintiff's liability, and even after the contract was carried out and performed, he had the right to be heard and contest the matter in a court of law; this proposes an entire change, and to divest him of his estate in a summary manner, without either trial or judgment. It reaches beyond the remedy and goes to the absolute right. If such substantial changes can be made under the specious pretence of altering the remedy, the rights of the citizen rest on a slender foundation.

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An objection has been urged that injunction was not proper, and that plaintiff had ample redress at law; but this court has allowed relief by injunction where real estate was about to be sold for the non-payment of taxes assessed by a municipal corporation, but has never allowed it to prevent a sale of personal property. In one case a cloud is about to be drawn over a land title, and the court interferes to prevent it; in the other case the legal remedy is complete and full, and equitable interposition is not needed. (*Lockwood v. City of St. Louis*, 24 Mo. 207.)

The city in this case is not remediless, but it must pursue its redress in a different way.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

ORLANDO AND AMANDA SAWYER, Respondents, v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Bailees—Railroads—Negligence.*—Carriers of passengers not being insurers of their safety, are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed. They are not liable for mere accident, or misadventure, any more than for the act of God, or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the road. In addition to this, there must be some actual negligence, or want of strict care, diligence, and foresight.
2. *Bailees—Railroads—Negligence.*—In a suit by a passenger on a railroad train for injuries occasioned by the cars being thrown into a chasm, occasioned by the burning of a bridge by the public enemy, of which defect in the road the conductor of the train was prevented from receiving notice by the agents and servants of the road being driven off or overawed by the enemy,—an instruction confining the issue of negligence to the particular case in the running of the cars, and telling the jury that “if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the carrier was not liable for the injury,” was improperly refused, as it presented to the jury the principle that the defendant was not to be held liable for mere accident, in the absence of any want of

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that degree of care and prudence which the law requires. If it were not the negligence of the conductor of the train, or his want of care and foresight, that was the proximate or remote cause of the accident and injury, the carrier was not liable.

3. *Practice—Instructions.*—Instructions should not be so framed, nor given and refused, as to exclude from the jury the consideration of the points which are fairly raised by the evidence.
4. *Practice—Jury—Misbehavior.*—A traverse juror is not a competent witness to prove misbehavior in the jury. For a jury to make up the amount of the verdict by each juror naming a certain sum and then dividing the aggregate of the sums specified by the number of the jury, is an improper mode of making up the verdict, and is misbehavior on the part of the jury.
5. *Practice—Excessive Damages—Verdict.*—Verdict set aside for excessive damages.

Appeal from Buchanan Circuit Court.

On the 19th day of August, 1862, respondents commenced suit in the Circuit Court of Buchanan county, to recover the sum of \$15,000 for injuries which Amanda, wife of Orlando Sawyer, received on the night of the 3d of September, 1861. Respondents state that said Amanda was a passenger on appellant's railroad by virtue of a contract, and that the train of cars on which she was a passenger was precipitated into Platte river at a point where the appellant's road crosses said stream in Buchanan county; that the disaster was caused by the negligence, recklessness and unskilfulness on the part of the agents of the appellant in conducting and managing the train on which she was a passenger from Palmyra to the appellant's depot in St. Joseph; that appellant's road was defective and insufficient by reason of the railroad bridge spanning Platte river having been destroyed between the hours of one and five o'clock P. M. on the day aforesaid, and that by reason of the negligence and unskilfulness of the agents of the appellant and the insufficiency of said railroad and bridge the said respondent was injured in the head, shoulders and other portions of the body, destroying her health and rendering her incapable of performing any sort of labor whatever.

The appellant denied that the train of cars described in the respondents' petition was run carelessly, recklessly or at

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full speed at the time and place alleged in said petition. Appellant admitted that the bridge across Platte river on its railroad was destroyed at the time said train of cars approached, ran and was precipitated into said river ; but alleged that some time in the evening or prior to the regular passenger train of that day, to-wit, the 3d day of September, 1861, bound west from Hannibal to St. Joseph, a band of armed men, enemies to the Government of the United States and the Provisional Government of the State of Missouri, who had rebelled against and thrown off their allegiance to said governments, drove off the agents and employees of appellant on that part of said railroad where said bridge was standing, and set fire to and burned down said bridge, and whilst it was burning and after it was burned down ,until the arrival of said train at the place where said bridge stood, guarded it, and that part of appellant's railroad where said bridge had stood, so as to prevent, and actually did prevent, any of appellant's agents or employees from giving warning or notice to the conductor or other agents or employees on said train. Appellant avers that by reason of the premises said train was run and precipitated into Platte river where said railroad crosses said river, and where said bridge had stood, although said train of cars was well manned and equipped, and the conductor in charge of said train of cars and the employees on it well, carefully and skilfully performed and discharged their respective duties in conducting, running and managing said train of cars ; that said train of cars was run and precipitated into said river as aforesaid without any negligence, unskilfulness, misconduct or fault on the part of the appellant, its officers, agents and servants, and could not have been prevented by any vigilance, diligence, practice, agency or foresight of appellant, its officers, agents or servants ; that said accident to said train of cars is the same accident of which respondents complain in their petition against appellant. Appellant says that the defect and insufficiency complained of in respondents' petition is not a negligent defect and insufficiency, and denies that

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said respondent Amanda sustained any damage in consequence of any negligence and unskilfulness of appellant, its officers, agents or servants, as is alleged in the respondents' petition.

The evidence on the part of the respondents tended to show that the bridge across Platte river on appellant's road was burned down about 5 o'clock p. m. on the 3d day of September, 1861; that the respondent Amanda Sawyer was a passenger upon the train bound west that day to St. Joseph; that it arrived at Platte river about 11 o'clock at night, and ran and was precipitated into Platte river; that in consequence thereof she received a good many bruises and a scalp wound on her head; her shoulders and arms were bruised, but no fractures of any kind. The scalp wound was the principal one. She did not seem to have good use of her arms; she could get up, stand up and walk; she was attended about ten days by a physician in St. Joseph, who testified that "the scalp wound as well as all such scalp wounds are very easily cured, heal up and get well very readily as a general thing, and I saw nothing about this to prevent such a result; and when I quit attending the plaintiff, my opinion was she would soon get well; the wounds upon the arms and shoulders I considered only upon the muscles, not serious; but her nervous system received a great shock from the jar she received." She admitted on her way from St. Joseph and on the Sunday after she got home, that she was not seriously hurt. She commenced teaching school in two or three months after the accident, walking to and from the school-house, a distance between a quarter and a half mile.

The evidence on the part of the appellant tended to show that the country all along the line of the appellant's railroad was at the time of the accident in question, and had been for several months prior thereto, in a state of rebellion and open war with the Government of the United States and the Provisional Government of Missouri, established in July preceding; that the great mass of the citizens along the line of said railroad were hostile to the Government of the Unit-

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ed States and the Provisional Government of Missouri and in sympathy with the rebels ; that the officers, agents and employees on said railroad, as a class, were loyal to the Government, State and National, and gave their aid and influence in favor of the Federal and State Governments in the great struggle with treason ; that said railroad after the inauguration of hostilities was used almost daily, on some part of the line, in transporting Federal troops and munitions of war over it ; that in consequence thereof the appellant, and its officers, agents and employees, incurred the most bitter and unrelenting animosity of the rebels and their sympathizers, and by way of retaliation they perpetrated almost daily acts of hostility upon the appellant's railroad and the agents and employees on the same, such as burning cars, bridges and culverts, tearing up the track, sawing ties, &c., and firing into passenger trains, commencing in June, 1861, and continuing from that until the burning of the bridge across Platte river on the afternoon of September the 3d, 1861 ; but nearly all of these depredations and acts of hostility had been done on the eastern division of said road ; that the western division had been regarded as comparatively safe for trains and passengers during all of this period, there never having been any disturbance on the railroad so near to St. Joseph as the bridge across Platte river, prior to said accident ; that the passengers on the train in question were well aware of the state of the country and condition of things along appellant's railroad.

That a few days prior to the said accident a considerable body of armed rebels had rendezvoused about 13 to 15 miles north of the bridge across Platte river, and their camp was known as "Patton's Camp;" also a considerable body of armed rebels had rendezvoused about 6 miles south of said bridge, and their camp was known as "Gibson's Camp." Small bands of armed men were constantly passing to and from these camps on the east and west sides of said bridge, reconnoitering, watching and reporting the movements of trains upon appellant's railroad ; that the demeanor of these

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bands was so menacing and terrifying as to completely overawe the citizens in the immediate vicinity of the bridge, who had any proclivities for the Government; that they were afraid to go away from their homes so as to give any information to the agents and employees of appellant of the burning of said bridge, lest they should be killed for so doing; and said bands had threatened and so terrified the section hands on the section extending to the bridge on the east side, and whose duty it was to watch the bridge and see that it was safe, that they refused on the day before the accident to go over that part of the section lying between Easton ($3\frac{1}{2}$ miles east of bridge) and the bridge, the greatest portion of the distance being through timber and brush, which afforded good lurking-ground for the bushwhackers to way-lay and shoot them.

The bridge was burned down by a band of 12 or 14 armed men between 2 and 5 o'clock in the evening of the 3d of September, 1861. They guarded the railroad in the vicinity of the bridge from the time they went to it until after the accident in question, which took place about 11 o'clock at night, so that there was no possible chance for any agent or employee to have gone to the bridge and ascertained that it was burned down, without running a great risk of losing his life. Three or four of these armed men were seen on the western abutment, looking down upon the wreck, after the disaster, and were called upon by the mail agent to come down and assist him and the baggage master (the only two on the train capable of rendering assistance to the wounded and dying) in extricating the passengers from the wreck; but they never said a word—rendered no assistance. After the mail agent and baggage master had extricated all they could from the wreck, and then started towards St. Joseph for a relief train, these men struck out in a northwesternly direction. These men found several ties thrown across the track, and found a small bridge on fire about $\frac{1}{4}$ of a mile from Platte bridge, from the light of which they discovered about a half a dozen armed men concealed behind some

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brush near to said bridge, and when they returned about day-light with a relief train, they found another culvert, a short distance west of the first, on fire ; the next morning after the relief train arrived at the scene of disaster, the baggage master started east, to Brookfield, to give information. On his way he saw several small bands of rebels along the railroad, at short intervals, until he got a considerable distance from the scene of disaster. Some of the neighbors likewise saw one or two armed rebels very early the next morning a short distance west of the Platte bridge.

There were seven men on the train in the employ of the appellant at the time of the disaster, conducting, running and managing it, *five of whom were killed*. Amongst the number were Stephen G. Cutler, the conductor and — Clark, the engineer.

Col. Hayward, the general superintendent of the appellant's railroad, testified that Col. Curtis, on behalf of the Government of the United States, notified him in June preceding that the Government would take possession of the road and use it whenever it desired for the transportation of troops and munitions of war ; that when the Government did not need it for this purpose, the company could use it for the transportation of passengers and property. The officers of the appellant at that time all resided in Hannibal. It was the policy of the Government to keep the road open, and have trains run on it with as much regularity as possible, so as to show its power and majesty, and thus have its moral effect upon the citizens along the line.

At the request of the respondent the court gave the following instructions to the jury :

1. That a railroad company which carries passengers for hire binds itself to carry safely those whom it takes into its cars, as far as human care and foresight will go ; that is, the utmost care and diligence of a very cautious person, and is responsible for even the slightest neglect.

2. If the jury believe, from the evidence, that defendant was such a railroad company, and that plaintiff Amanda

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Sawyer is the wife of Orlando Sawyer, and that she was a passenger on the cars of the defendant, under contract to carry her over its railroad to the depot in the city of St. Joseph, and while she was such a passenger said defendant or its officers or agents in charge of said cars did not conduct and manage said cars with the care and foresight explained in the first instruction, and that in consequence of the want of such care and foresight said cars were precipitated into Platte river where said road crosses the same, and plaintiff Amanda Sawyer was injured thereby, they will find for plaintiff the damages said Amanda Sawyer sustained by reason of said accident.

3. If the jury find for plaintiff, they will, in assessing damages, consider not only the bodily pain and injuries sustained by said Amanda Sawyer, but will also consider the alarm, nervous injury and mental anguish sustained by her in consequence of said injury.

To the giving of which instructions the appellant at the time excepted.

The defendant's attorney then asked the court to give the following instructions to the jury:

1. That unless the jury believe from the evidence that the defendant's road, or the bridge on Platte river, was, at the time of the grievance complained of, out of repair by the fault or negligence of the defendant or its agents, or that the train of cars in which plaintiff Amanda Sawyer was being transported was run and precipitated into Platte river, when the bridge over the same had been destroyed, by the negligence or mismanagement of defendant, or of its agents conducting or running the same, they will find for the defendant.

2. That negligence is a question of fact, which is to be ascertained by the jury taking into consideration all of the facts and circumstances connected with, or surrounding, the act complained of. The jury are not authorized in this case, if they should find for the plaintiff, to find exemplary damages, but they are confined to the actual or real and natural

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damages sustained by the plaintiff growing out of the injury complained of.

3. If the defendant had agents running their locomotives and cars of competent skill, and said agents used all of the care and diligence that would be used by a very prudent and careful man under similar circumstances when his own safety was concerned, and without negligence, then the defendant would not be liable to the plaintiff for any accident which might happen while being transported under such circumstances.

4. The court instructs the jury that the defendant was bound, by the laws of this State, to receive and transport all passengers offered upon said road for transportation, at the time of the happening of the supposed injury named in plaintiffs' petition.

5. If the defendant had agents running its locomotives and cars of competent skill, and said agents used all of the care and diligence that would be used by a very prudent man in his own affairs, then the defendant would not be liable to plaintiffs for any accident which might happen them while being thus transported on the road of defendant.

6. If the agents of defendant who were running the train of cars upon which Amanda Sawyer was a passenger at the time of the injury complained of, conducted and managed said train with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all of the circumstances surrounding the case, and the injury complained of was the result of mere accident, then the defendant is not liable for the same, and the jury will find for the defendant.

7. If the jury believe from the evidence, that at the time alleged in plaintiffs' petition, a band of armed men, enemies to the Government of the United States and to Missouri, drove the defendant's agents and employees off that portion of defendant's road where Platte river bridge was then standing, and set fire to and burned down said bridge, and

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while said bridge was burning, and after it was burned down, until the arrival of said train described in said petition, guarded that portion of defendant's road where said bridge had stood so as to prevent, and actually did prevent, any of defendant's agents or employees from giving any notice or warning to the conductor or agents or employees on said train that said bridge was burned down, and that said conductor and none of the other agents or employees on said train had any knowledge or information that said bridge was burned down, they will find for the defendant, notwithstanding they may believe that the plaintiff Amanda Sawyer was a passenger on said train, and that said train ran and was precipitated into Platte river in consequence of said bridge being burned down and the said Amanda Sawyer was thereby injured.

8. If the jury believe from the evidence that the accident in question could not have been prevented by any vigilance or foresight of the defendant, its officers, agents or employees, they will find for the defendant.

9. If the jury believe from the evidence that the plaintiff Amanda Sawyer received the injuries complained of in plaintiffs' petition in consequence of an act of the enemies to the Government of the United States and of Missouri, they will find for the defendant.

10. The jury are instructed that the defendant, at the time of the injury complained of in the petition, was a common carrier of passengers and property, and as such was required by a statute of the State of Missouri to carry the plaintiff Amanda Sawyer; and if the jury believe from the evidence that said Amanda Sawyer was a passenger on the train described in said petition, and that the conductor and other agents and employees on said train, in managing, conducting and running said train, exercised that degree of care and diligence which a very prudent man would exercise under similar circumstances, and that a band of armed men, enemies to the Government of the United States and the State of Missouri, had burned down the bridge across Platte

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river on defendant's road a few hours previous to the arrival of the train, and that said act was not known to said conductor or other agents or employees on said train, and that said train was run and precipitated into Platte river in consequence of said burning of the bridge, then the defendant was not guilty of negligence, and they will find for defendant notwithstanding they may believe from the evidence that said plaintiff was injured by being run and precipitated into Platte river.

The first four of said instructions the court gave, but the balance of said instructions it refused to give; to which refusal of the court to give said instructions appellant, at the time, excepted.

The case was then submitted to the jury, who found for the respondents, and assessed the damages at \$6,900, for which the court rendered judgment.

The appellant then filed a motion to set aside said verdict and grant a new trial, assigning the usual reasons and that the damages were excessive, and also that the jury had found their verdict as follows: "Because the jury improperly ascertained their verdict by casting lots, or by setting down each one a different speculative amount and dividing the aggregate by twelve, and thus found an excessive verdict."

The affidavit of Jacob Hursch, one of the jurors, showed that said verdict had been found as above stated.

The court overruled said motion, to the overruling of which the appellant at the time excepted and filed its bill of exceptions, and brings this case to the Supreme Court by appeal.

Carr and H. M. & A. H. Vories, for appellant.

On this record the following points arise:

I. The appellant was a common carrier of passengers at the time of the grievances complained of, and as such bound to carry all who wished to be carried, unless there was some legal excuse for refusing.

II. If the appellant had refused to carry the respondent Amanda Sawyer, the same as it did other passengers, it would

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have been guilty of *a breach of duty*, and liable to an action for damages.

III. The relation of passenger and carrier existed between said respondent Amanda Sawyer and the appellant.

IV. Common carriers of passengers are not *insurers* of the safety of their passengers as common carriers of goods and the baggage of passengers are. For an injury happening to a passenger by a mere accident, without any fault, they are not liable ; but they are liable only for the want of due care, diligence and skill.

V. That part of the country where the accident occurred was in a state of furious civil war at the time of said accident; the bridge over Platte river, on appellant's railroad, was burned down by public enemies, and that part of appellant's railroad so guarded that no agent or employee could give warning to the conductor or any other agent or employee on the train of that fact, and thus prevent said train from running and being precipitated into Platte river.

VI. The agents and employees of defendant were not guilty of negligence in conducting, managing and running said train as they did at that time, as that part of the railroad was guarded by the public enemy, so that it was impossible for any agent or employee to give them warning of the danger at Platte bridge, and, the whole line of the road being infested with enemies, it was safer, in the absence of positive information to the contrary, to run ahead and take the chances.

VII. The instructions given to the jury at the request of the respondents entirely ignore the state of war then existing, and the difficulties and dangers (growing out of the state of war) which beset the appellant in running its trains. They exclude from the consideration of the jury the defence set up by the appellant ; they are calculated to mislead, and hence do injustice.

VIII. Even if a clear legal liability be fixed upon the appellant, the damages assessed are out of all proportion to the injury received, and hence they are excessive.

IX. One or more managing men on the jury procured the

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guileless and unsophisticated members of the jury to agree to make their verdict by each one setting down the amount for which he was willing to render a verdict in favor of the respondents, and then divide the aggregate by the number of the jury ; and after getting them into this agreement, said managing ones fraudulently set down the sum at an enormous amount and divided the aggregate by twelve, and thus secured a verdict for an excessive amount.

It is admitted by the pleadings that the appellant was a common carrier of passengers at the time of the accident alleged in the respondents' petition, and as such it was bound by a statute of this State to "furnish sufficient accommodation for the transportation of *all* such passengers, baggage, mails, and express freight, as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other roads, and at the usual stopping-places ;" "and shall be compelled to receive *all* passengers, personal baggage, mails, and express freight, offered for transportation." "Every such railroad corporation is hereby required to transport passengers," &c. (Sess. Acts 1861, §§ 1 & 2, p. 53.)

Here is a very rigid and onerous duty imposed upon the appellant by a statute of the State, "any violation or evasion" of which might be pleaded in bar to any suit brought by such railroad corporation, thus depriving it of its standing in court by depriving it of its capacity to prosecute suits. Superadded to this disability is a penalty of a thousand dollars for each and every violation of the provisions of said act—immaterial how trivial—to be recovered by civil action in the name of the State. (Ib. §§ 10 & 11.)

There are no exceptions nor limitations to the duty thus imposed as there were by the common law. It is to be performed anyhow and at all events. The appellant was bound, then, to carry the respondent Amanda Sawyer when she offered herself; otherwise it would have incurred the penalty and forfeiture provided by said act, and, in addition, she might have sued the appellant for a failure to perform its duty under said act.

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This act does not prescribe what degree of care and diligence should be exercised by the appellant in the discharge of this duty. It is a principle of law that whenever a duty is imposed by law, the exercise of reasonable care and diligence in the performance of such duty is a sufficient compliance. The law does not require impossibilities.

The relation of carrier and passenger existed between the appellant and the respondent Amanda Sawyer at the time of the accident in question. Did the appellant fully and faithfully perform the duty thus imposed by law? It is affirmed that it did, and hence it ought not to be held liable.

But if the right to recover in this case be based upon the common law, the respondents must fail. There is a broad and palpable distinction between the liability of a common carrier of goods and baggage, and a common carrier of passengers. In the former case they are *insurers* of the safe transportation and delivery of the goods and baggage confided to them, with two exceptions, viz., the act of God, and the public enemy (Red. §§ 124, 141; Ang. Carr. § 521); in the latter case, "not being *insurers*, they are not responsible for accidents where all reasonable skill and diligence has been employed." (Sto. Bailm. § 602; Red. § 149, and authorities there cited; Ingalls v. Bills et al. 9 Metc. 1; Smith v. Han. & St. Jo. R.R. Co., decided at the present term.)

"When everything has been done which human prudence, care and foresight can suggest, accidents may happen. The lights may in a dark night be obscured by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally by striking another vehicle, or by meeting with an unexpected obstruction, or, from the intense severity of the cold, the coachman, although possessed of all proper skill, and taking all due and reasonable care, may at the time become physically incapable of managing his horses, or of otherwise doing his duty: in all these and the like cases, if there is no negligence whatsoever, the coach proprietors are exonerated." (Sto. Bail. § 602.)

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Negligence is a relative term. What would be gross negligence in times of profound peace, frequently is the only true policy to be pursued in time of war. Now, were the appellant's agents and employees on that train guilty of negligence in running on what they supposed to be Platte bridge that night, under the circumstances surrounding them? It is thought not. Were the passengers deceived, or did they not understand the true state of affairs along the line of the road? That very train had been turned back not far from Palmyra in consequence of a bridge having been tampered with the day before so that it could not be crossed, and every passenger on it knew the fact.

The fact is *the passengers knew and understood the state of affairs along the line of the road just as well as the agents and employees*, and they were willing to take their risks and stand their chances along with them without holding the appellant bound to carry them with *safety* as they would in times of profound peace. They certainly were willing to take, and actually took, all risks to which a state of war necessarily exposed them.

The testimony of the surgeon who dressed the injured respondent's wounds, and of her neighbors who saw her daily, together with her own admissions, establishes beyond all controversy that she was not *permanently* injured. A short time after the disaster we find her discharging, acceptably, the duties of a teacher, in Kansas, and ever since attending to her household duties as a mother and wife. We do not find, in her case, a helpless cripple, her life intolerable. Nor do we find her a charge upon private or public charity. Nor are her services and counsels lost to her husband or child. She still lives in the full vigor of body and mind, to cheer and counsel the one, rear and educate the other. Such being the case, the damages assessed are out of all proportion to the injury received—they are excessive; and to suffer the verdict and judgment in this case to stand, would be to convert the courts of the country from instruments for meeting out even-handed and exact justice to parties litigant, engines

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of oppression and injustice. (21 Mo. 354; 12 Barb. 492; 19 Barb. 461.)

Our Practice Act expressly provides for granting a new trial "when the jury shall be guilty of *misbehavior*." (R. C. 1855, § 4, p. 1286.) The affidavit of Jacob Hursch, one of the jury, clearly shows that the jury was "guilty of misbehavior"—gross misbehavior—in finding the verdict in this case. The policy of our law is to let in all the light upon a subject that can be obtained. It is immaterial whether it comes through a stained medium or not. It is for the court or jury to weigh it, and say what it is worth. If the appellant is not permitted to show the misconduct of the jury in finding this verdict by the testimony of one of their number, then the misbehavior of a jury can scarcely ever be shown. ("Breach of Duty," see Bartlett v. Crozier, 17 Johns. 438)

Points and authorities for respondents:

The instructions given by the court, on motion of plaintiffs, are correct. The first of these instructions is a literal abstract from Story on Bailment, and is the well established law. (Sto. Bail. § 601; 2 Kent's Com. 600; Greenl. Ev. § 221; Stokes v. Salstonstall, 13 Pet. 181; Derby v. Philad. & Read. Railw., 14 How. 483; St. bt. New World v. King, 16 How. 469-74; Redf. Railw. 323.)

The second instruction is but an application of the principle announced in the first instruction to the facts of the present case; and the first instruction being correct, the second instruction is correct also, as a matter of course.

The third instruction states the measure of damages correctly. (Canning v. Inhab. of Williamstown, 1 Cush. 452; Morse v. Aub. & Syr. Railw., 10 Barb. 623; Redf. Railw. 337, n. 3; Seger v. Town of Barkhamsted, 22 Conn. 298; 20 Pa. 292.)

The instructions of the defendant that were refused by the court were properly refused. The first of these instructions had no application to the issues of the case, and, besides, is not the law. It asserts that defendant was bound by law to

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transport all persons over its road who offered for that purpose, at the very time of the disaster, although it was unsafe and dangerous to do so. This is not the law. (Redf. Railw. 327.)

The fourth and fifth instructions refused by the court are in direct conflict with the first instruction given for plaintiffs, and are not the law. (Sto. Bail. § 601; 2 Kent's Com. 600; 2 Greenl. Ev. § 221.)

The sixth and eighth instructions asked by defendant were properly refused. They assert the principle that if the public enemy destroy a bridge on a railroad, that the railroad company are not required to exercise any care to guard against accidents at that point, and may carelessly destroy the lives of their passengers, or injure them to any extent, with impunity.

The seventh instruction was properly refused. The court had already declared, in two other instructions given for defendant, that plaintiffs could not recover unless Amanda Sawyer had been injured in consequence of the negligence or mismanagement of defendant's agents. This instruction merely repeated this principle in different words, and was therefore unnecessary and improper.

The court properly excluded the evidence of juror Hursch to impeach the verdict. (Taylor v. Giger, Hard. 586; Heath v. Conway, 1 Bibb, 398; Philips v. Baxter, 1 Bibb, 400; State v. Baker, 22 Mo. 349; Dana v. Tucker, 4 John. 488; 1 Greenl. Ev. § 251; Phil. Ev. 4; Pratte v. Coffman, 33 Mo. 77; Graham on New Tr. 111-12.)

The verdict is not excessive. The evidence makes a case of most outrageous carelessness on the part of defendant, and of most intense suffering on the part of Mrs. Sawyer.

The motion for a new trial was properly overruled. (Redf. Railw. 347; Woodson v. Scott, 20 Mo. 272; Wells v. Sawyer, 21 Mo. 357; 1 Graham & W. on New Trials, 418, s.p.)

HOLMES, Judge, delivered the opinion of the court.

The cause of action is based wholly on the ground of neg-

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ligence. A new trial is asked mainly for the reasons that the court below erred in the giving and refusing of instructions, and that the damages were excessive. It is also urged that there was misconduct in the jury respecting the manner in which the verdict was made up. The allegation of negligence in the petition was, that the train of cars was precipitated into the Platte river, and the plaintiff injured, by the negligence and unskilfulness of the officer or agent employed by defendant to manage, conduct, or run the same, on the night of the third day of September, 1861, whilst running carelessly, recklessly, and at full speed, when danger was, or should have been, apprehended ; that the railroad was at the time defective and insufficient, by reason of the bridge over the Platte river having been burned down and destroyed between one and five o'clock of the afternoon preceding ; and that by reason of such negligence and unskilfulness of the agent or officer of defendant, so, as aforesaid, running, managing and conducting the said train of cars, and by reason of said defect and insufficiency in the railroad and bridge, the plaintiff suffered the injuries complained of. The answer denied all negligence, and alleged in substance that the bridge had been burned down by the public enemy, a few hours previous to the passing of the train ; that the section agents along the road in that part, whose duty it was to watch the condition of the track, had been overawed and driven off, so that no notice of the burning of the bridge had come to the knowledge of the officers in charge of the train ; and that the defect or insufficiency of the road complained of was not a negligent defect or insufficiency.

It is clear from the evidence that there was no other defect or insufficiency in the bridge or the railroad than what arose from the fact that the bridge had been burned down by the public enemy, a few hours previous to the passing of the train. The accident happening solely in consequence of the bridge having been destroyed in this manner, it is plain that this was not what is ordinarily understood by a defect or insufficiency in a railroad. The question of negligence that was

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really in issue in this trial, must be regarded as having reference solely and exclusively to the acts and conduct of the officer who had charge of the train upon that occasion. There was much evidence and some argument in the case, touching the operations of the public enemy, the insurrectionary state and condition of the country, the military orders, and the policy of the Government with regard to keeping the railroad open, the propriety of the action of the railroad company in continuing to run passenger trains when the railroad and trains were threatened with danger, the duty of the company to take all passengers who offered to go on the road, and the risks which passengers voluntarily undertook in the face of dangers known to them, and for which they were to be held alone responsible. This kind of evidence was not pertinent to the issue, and it should properly have been excluded. The question was not whether the train should have been run at all on that day, but whether there was any such negligence, or want of care, prudence, and foresight, on the part of the officer who was engaged in running and conducting the train on the particular occasion, as would render the defendant liable for damages for the injuries sustained by a passenger; and on this issue the acts and doings of the public enemy were in no otherwise important than as showing when and how the bridge was destroyed, and that it was done by a power beyond the control of the defendant, or of the officer in charge of the train, or that it was burned down at such a time and under such circumstances that they might and ought to have had knowledge of it, and so were to be held responsible for their ignorance of the fact, as amounting to that degree of negligence or want of care, diligence, and foresight, which the law required of them. It is a well established rule of the law of carriers of passengers, that where an accident and injury occur by reason of the breakage of carriages, cars, or machinery, or by reason of any defect of construction, or any insufficient condition or state of repair of the railroad or its bridges, these facts alone import some degree of negli-

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gence, and make a *prima facie* case of negligence for the plaintiff sufficient to shift the burden of proof upon the defendant. (2 Greenl. Ev. § 222.) And when the simple facts were shown that a railroad bridge was down, and that the train was precipitated into the chasm, and the plaintiff injured, it may be said that a *prima facie* case for the plaintiff was made out. On that evidence alone, there would certainly appear to be a negligent defect or insufficiency in the railroad; but when it was made to appear further that the bridge was down by reason of the sudden inroad and hostile act of the public enemy, and not by reason of any deficiency of construction or any insufficiency in the condition and state of repair of the road, that *prima facie* case, so far as resting upon this ground alone, was completely rebutted and disproved. The only question that would remain for inquiry under this petition would be, whether there had been any negligence, or want of proper care, diligence, skill, and foresight, on the part of the conductor or officer engaged in running, managing and conducting the train. There was no allegation of negligence in any other officer or agent of the company on this occasion, whether engineer, station agent, or section man. The evidence tended strongly to show that that the men whose duty it was to watch the condition of the road in that part, and report any insufficiency, had been driven off by hostile armed bands of the enemy, so that they, as well as other persons in the neighborhood, who had knowledge of the fact, were afraid to risk their lives by undertaking to inform the agents of the company to the east of the bridge of the fact that the bridge had been destroyed; and no such information had reached them. The inquiry was thus narrowed down to the actual conduct of the conductor of the train, on such facts as he knew, or might have learned by any reasonable diligence in making inquiries. In a case of this kind, it is only on the ground of actual negligence that even a carrier of passengers is to be held liable; the burden of proof is on the plaintiff; and he must establish the fact of negligence by competent evidence,

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otherwise he cannot recover. Carriers of passengers not being insurers of their safety, are not responsible where all reasonable care, skill and diligence, prudence and foresight have been employed. (2 Greenl. Ev. § 222; Sto. Bail. § 602; Redf. Railw. 323-9 and notes; Holbrook v. Ith. & Schenec. R.R., 2 Kern. 236.) They are not liable for mere accident or misadventure, any more than for the act of God, or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the railroad. In addition to this, there must be some actual negligence, or want of strict care, diligence and foresight. As to what constitutes such care, diligence and foresight, or what shall be the standard of judgment in such cases, the law does not seem to have defined any positive and unbending rule. Various expressions are used by different authorities. The terms *utmost, strictest, all human, extraordinary*, have been employed; and it has been said, by very high authority, that "when carriers undertake to carry persons by the powerful and dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence;" and that "any negligence in such cases may well deserve the epithet of *gross*." (Philad. & Read. R.R. Co. v. Derby, 14 How., U. S., 468.) These are very strong, but somewhat indefinite terms. Numerous decisions have held that the matter of negligence, or care and prudence, is in some degree relative, and that they must be in proportion to the nature, difficulty and peril of the business (Nottow v. Western R.R., 15 N. Y., 444); and it can scarcely mean anything more than such care, diligence, skill and foresight as careful and prudent men are reasonably expected to exercise in the particular business, under like circumstances of difficulty and danger. More than this would come near to rendering railroad companies liable in all cases of accident and misadventure. Often-times after an accident has happened it is easy to see how it might have been avoided; but if the company were to be held liable in all such cases, it would never be safe for them

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to run a train at all. Care and foresight must be taken in reference to the business, the time, the occasion, and the nature of men, or they can have no definite meaning whatever. In this case it does not appear that there was evidence of any positive act of carelessness, omission or remissness of his ordinary functions and duties on the part of the conductor, unless it were a lack of the requisite degree of prudence and foresight in view of the dangers to be anticipated ahead on the road. He had no knowledge of the presence of the enemy in force about the bridge, nor of the fact that the bridge had been burnt, nor does it appear that the station agent at Easton had any intimation of that fact, which he might have communicated to the conductor. He seems to have believed that the train had passed the region where danger was most to be apprehended. The train was running at a speed not above fifteen miles an hour, when the card time required twenty miles an hour. A passenger had intimated to him that he had been uneasy all day, and was fearful that something might be wrong at the bridge which they were approaching, and suggested to him that it would be safer to stop the train before attempting to cross; but he had no particular reason for his apprehension, and the conductor supposed himself to be better acquainted with the actual state of affairs along the road than the passenger. A train had gone safely through the day before, from St. Joseph to Hannibal. More danger seems to have been expected from men firing into the train, than from the burning of the bridges, and that peril would be increased by stopping the train. All the circumstances were to be considered, and the question of a reasonable degree of care, prudence and foresight was a matter for the jury to decide, under the instructions of the court as to the rules of law governing such a question, so far as any such rules have been established. The instructions which were given for the plaintiffs were expressed in broad and general terms, and, so far as they went, laid down the rule accurately enough on the side of plaintiffs. They adopted the language of the best writers on the subject, and they

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can hardly be considered as in any way materially objectionable. The instructions given for the defendant, which were also couched in very general terms, would seem to be free of serious objection. Of those that were refused, it can scarcely be necessary that we should particularly notice more than the seventh, eighth, ninth and eleventh. The seventh confined the inquiry to the issue of negligence in running the train of cars on the particular occasion, and told the jury that if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the defendant was not liable. This instruction would seem to be entirely correct and proper, and we think it should have been given. It presented a correct view of the question on the side of the defendant, and it enunciated distinctly the important principle that the defendant was not to be held liable for mere accident, in the absence of any want of that degree of care and prudence which the law requires. If it were not the negligence of the conductor, or his want of care and foresight, that was the cause of the accident and injury, proximate or remote, the defendant was not liable. If the burning of the bridge were the act of the public enemy, and the fact were unknown and unknowable to the conductor by the degree of care and foresight propounded in the instructions, then it was the burning of the bridge that was the sole cause of the accident and injury, and in reference to the conductor and the defendant it was pure accident or misadventure.

The eighth instruction was sufficiently in accordance with this last proposition, except in so far as it left out of view the consideration of the question for the jury whether the conductor, in the absence of any knowledge or means of information concerning the burning of the bridge, had exercised the requisite degree of care and foresight, in view of

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the information which he had concerning the state of the country, and the probable dangers to be apprehended ahead on the road. This last was a matter for the jury, if there were any evidence before them bearing upon the question. If there were no evidence tending to prove such want of care and foresight, such an instruction might be given; otherwise not. The eleventh instruction contained and submitted this question of care and foresight to the jury, in addition to the same matter embodied in the eighth instruction, and so was free from the same objection; and we think it should have been given. It presented the issue fairly on the side of the defendant, and more definitely than the other instructions which were given in general terms only. The ninth instruction, in reference to the state of the evidence before the jury, contained a correct proposition of law, and might have been given. We think the defendant was entitled to have the benefit of these instructions. The instructions that were given on either side, indeed, placed the whole issue substantially before the jury, but in the most general terms, and mainly on the plaintiffs' side; and by the refusal of these particular instructions for the defendant, undue prominence was given to the plaintiffs' view of the case, and the precise and especial ground of the defence was in a great measure withdrawn from the consideration of the jury, thrown into the background, and apparently negatived altogether. Instructions should not be so framed, nor given and refused, as to exclude from the jury the consideration of the points which are fairly raised by the evidence on either side. (Clark v. Hammerle, 27 Mo. 70.)

In support of his motion, for a new trial, the defendant produced the affidavit of Jacob Hursch, one of the jurymen, to the effect that the jury had arrived at their verdict by agreeing that each juror should write down the sum which he wished to give as damages, that the aggregate amount should be divided by twelve, and that the sum so ascertained should be given as the amount of their verdict; that he was deceived by the fact, that some of the jurors, under this arrange-

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ment, put down larger sums than he had anticipated, and that he never would have agreed to the verdict, if he had not been bound by his previous agreement. This was undoubtedly an improper mode of making up a verdict, and it would amount to misbehavior on the part of the jury; but the law seems to be settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict; nor can affidavits of jurors be admitted in support of motions to set aside verdicts on such grounds, thus placing the verdict of the jury in the power of a single juryman. (1 Greenl. Ev. § 252, *a.*; Pratte v. Coffman, 33 Mo. 71; 1 Waterman's Gra. on New Tr., 2d ed., 111-15.)

Another ground for the motion for a new trial was that the damages were excessive. The evidence shows that the plaintiff was precipitated into the wreck of material, and lay buried there until morning, amidst wounded and dying men, in a situation of great horror and distress; but her actual injuries were not serious, consisting chiefly of a cut in the scalp, and bruises on the arms and shoulders. She received medical aid for about ten days, and in two or three months was entirely recovered. She was not permanently crippled or disabled, though receiving a severe nervous shock. The damages were \$6,900. In Collins v. Alb. & Schenc. R.R., 12 Barb. 492, this subject received an extended examination. The plaintiff had been injured in the head and foot. The outside of the feet and one toe had to be removed; he was seriously ill for several days, and his life despaired of; he could not be removed home for three months; and he was rendered a cripple for life. The verdict was for \$11,000, and it was reduced to \$5,000. So, also, in Clapp v. Hudson Riv. R.R., 19 Barb. 462, a verdict of \$6,000 was reduced to \$4,000, under conviction that a new trial would be granted otherwise. The bone of the plaintiff's leg had been broken between the knee and the ankle, and he had received some flesh wounds in the head. It was four months before he could be carried home, and five months more before he could dispense with the use of crutches; the injury had produced a

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curvature in the leg, making one leg an inch or more shorter than the other; and it was probable he would be lame for life. After much consideration, these verdicts were regarded not only as excessive, but to such a degree as to show that there had been some improper influence operating upon the minds of the jury, whether prejudice, a desire to punish the defendants for the carelessness of their agents, or some misconception of duty, or some perversion of judgment. We think the damages in this case are so exorbitantly excessive, when considered with reference to the actual injuries sustained, and the pain and anguish suffered, for which only the law undertakes to make pecuniary compensation by way of damages, as almost necessarily to imply some misconduct, undue feeling or prejudice, or some misapprehension of the proper measure and lawful object of damages in such cases. They are excessive enough to raise a strong conviction in our minds that the jury regarded more the terrible nature of the accident than the degree of carelessness which they could properly have attributed to the conductor of the train, or the actual amount of injury sustained by the plaintiff. But on this subject we need do no more than indicate our opinion. We think the error of the court below in refusing the instructions of the defendant, as above pointed out, is sufficient to justify a reversal of the judgment.

Judgment reversed and the cause remanded; Judge Wagner concurs; Judge Lovelace absent.

STATE OF MISSOURI, Respondent, *v.* THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Revenue—Corporations—Railroads.*—The lands granted by the State to the Hannibal and St. Joseph R.R. Co. by the act of Sept. 20, 1852, are not taxable for State and county purposes under the general revenue law. (Laws 1863-4, p. 65.) The property of the company is represented by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. (See Hann. & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550.)

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Appeal from Livingston Circuit Court.

Carr, for appellant.

Dixon & Vories, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The question presented in this case is, whether certain lands which were granted by the State to the Hannibal and St. Joseph Railroad Company, by the act of the General Assembly of September 20, 1852, (R.R. Laws, 115,) were taxable in the county of Livingston for the year 1864, for State and county purposes, under the general revenue law, (Laws of 1863-4, p. 65,) which enumerates as objects of taxation all "shares of stock in banks and other incorporated companies, the property of which alone shall be taxed," and "all property owned by incorporated companies, over and above their capital stock."

By the third section of the act making the grant of these lands (R.R. Laws, 116), it was provided as follows: § 3. In consideration of the grants and privileges herein conferred upon said company, the said company shall, on the first day of December of each year, after said road is completed, opened, and in operation, and declares a dividend, pay into the treasury of the State a sum of money equal to the amount of State tax on other real and personal property of like value, for that year, upon the actual value of the road-bed, buildings, machinery, engines, cars, and other property of said company, which shall be as a consideration to the State for the execution of the trust reposed in the State by the act of Congress of the United States, approved June 10th, 1852, entitled an "Act granting the right of way to the State of Missouri, and a portion of the public lands, to aid in the construction of certain railroads in said State"; and for the purpose of ascertaining the value of the same, the president of the company was to furnish to the Auditor of the State, each year, a statement of the valuation, under oath, giving "the actual value of the road-bed, machinery, buildings, en-

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gines, cars, and other property of said company, from which statement the Auditor was to charge the amount of the tax appearing to be due the State, and the same was to be paid by the company, under certain penalties; and after two years the tax was to be paid without regard to a dividend being declared or not. It was further provided that if the land remained unsold for ten years after the completion of the road the same should then be disposed of at public auction. (§ 6.)

In the case of the Hann. & St. Jo. R.R. Co. v. Shacklett, (30 Mo. 550,) it was decided, under the same laws, that the property of this company, "consisting of the road-bed, depot, cars, locomotives, and all the real and personal property necessary for the operation of the road," was not liable to taxation, under the general revenue law, for State and county purposes, in any county; that the company was exempted by its charter from such taxation, under the clause which declared that every person who shall cease to be a stockholder, shall also cease to be a member of said company; and that the stock of said company shall be exempt from all State and county taxes; and that the property above mentioned was to be considered as being represented by the stock. It was also held that the third section of the act aforesaid imposed a tax on the company in respect of the property therein mentioned, namely, "the road-bed, buildings, machinery, engines, cars, and other property of said company," which was to be assessed and collected in the mode specifically pointed out in the act, and that a double taxation could not have been intended by the Legislature. "A double taxation," says Napton, J., "on the same property is manifestly not intended, either by this enactment or by the provisions of the general revenue law." Now, the only *other property* of the company, besides that of the same description, which was the subject of decision in that case, which is sought to be taxed here in the county of Livingston, under the general revenue act, is a portion of the lands which were granted by the act of 1852, and which are subjected to taxation once, under the special

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provisions of that act. To allow them to be taxed in this manner in that county, would be to subject them to double taxation ; and the case comes clearly within the principle of that decision. If the property of a corporation is taxed in the hands of the stockholders, it cannot be taxed in the hands of the corporation also. A corporation is taxable like a natural person, but it is not to be taxed twice. (Ang. Corp. 429-31 ; Bangor & Piscat. R.R. Co. v. Harris, 22 Me. 533; Redf. Railw. 527.)

A general view of the original charters of the several railroad companies in this State would seem to show that it has been the policy of the State to exempt the property of these corporations from taxation otherwise than as stock held by the stockholders. In some instances it is provided that the whole property of the company, real and personal, shall be taken and deemed as personal property vested in the stockholders ; and even the stock of this corporation is expressly exempted from taxation. It might be said that the natural persons who held the stock could be taxed as such persons in respect of the shares of stock owned by them, and that the corporation, as an artificial person, might be taxed in respect of the real and personal estate owned by the company, without necessarily involving a double taxation of the same person ; but the taxation would still be double in respect of the same actual property, the stock certificate merely representing the several interest of the shareholder in the property of the corporation. On the authority of the case above cited, it must be held here that an exemption of the stock is to be taken as an exemption of the property represented by it. But this policy was changed, by the act of 1852, so far as to make the whole property owned by the corporation subject to taxation by the State, in the special mode and to the extent provided in that act. These lands were a donation by Congress to the State for the purpose of aiding in the construction of railroads within the State, and they were granted by the State to this corporation for the purpose of enabling it to complete a great public improvement for the

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general benefit of the people, in pursuance of the liberal intent of Congress. While owned by the Government they were not liable to taxation, but the State saw fit, in making the grant, to require as a condition from the corporation that an annual tax should be paid to the State, after a specified time. The company was allowed to hold these lands unsold for ten years after the completion of the road. It was evidently contemplated that the company might borrow money for the completion of the road, and that the lands should be reserved until they would command a higher price. If the lands had already been sold, and the proceeds applied to the building of the road, or to the extinguishment of a debt created for that purpose, the property would then have taken such direction in pursuance of the objects of the donation, that there could be no possible doubt that it was represented by the stock in the hands of the shareholders, and that an exemption of the stock would impliedly exempt the real and personal property of the corporation. (Redf. Railw. 531.)

But it is insisted that it is now held as "*other property over and above their capital stock,*" within the meaning of the general revenue law. In the case of the Hann. & St. Jo. R.R. Co. v. Shacklett, it was deemed unnecessary to decide what was meant by these words. The clause was said to be obscure. It is pretty evident that the framer of that act did not have present to his mind any clear and definite ideas of the subject of which he was speaking. It is not easy to see how, in any legal sense, a corporation could own other property than that which would be represented by the stock in the hands of the shareholders. The shares of stock might be above or below *par value*, according to the amount and value of the property owned by the corporation, and it is to be presumed that shares of stock would be taxed, if subject to taxation, in proportion to their value, like other kinds of property. (Redf. Railw. 531.) In this way the whole property would be once taxed against the natural persons, who are, at last, the only real owners of the property held by the corporation in which they are the stockholders.

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It would seem to be clear that, in contemplation of law, there cannot be any other property of this corporation, over and above the stock held by the shareholders. This conclusion necessarily results from the very nature and constitution of the corporation. We are of opinion, therefore, that these lands were not taxable in the county of Livingston as such other property.

The judgment is reversed and the proceeding directed to be dismissed.

Judge Wagner concurs; Judge Lovelace absent.

STATE *ex rel.* JONATHAN M. BASSETT, Plaintiff and Petitioner, *v.* WILLIAM P. RENICK, MAYOR OF THE CITY OF ST. JOSEPH, Respondent.

Elections. — Where a proposition to issue bonds was submitted to a two-thirds vote of the qualified voters of a city, it is sufficient if two-thirds of the qualified voters who voted at the special election, voted in favor of the proposition.

Petition for Mandamus.

J. M. Bassett, in person.

I. That the return of the defendant shows no legal cause for refusing to sign said bond; and said return admitting the truth of the facts in the petition, the writ of *mandamus* must be made peremptory according to the prayer of petitioner. (35 Mo. 198.)

II. That the city council of St. Joseph have no means of ascertaining the true number of qualified voters in the city at the time said special election was held, except by relying upon the number of votes polled at said special election as compared with the number of votes polled at the general election for city officers immediately preceding.

III. There having been more votes polled at said special election than at the preceding general election for city offi-

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cers, and nearly all of said votes being cast for said ordinance, the city council were authorized to consider said ordinance adopted by two-thirds of the qualified voters of said city.

IV. No voter was qualified to vote at said special election without first taking the constitutional oath, and there being no registry law by which the qualified voters in the city could be ascertained, the votes cast at the last election for city officers, and the votes cast at said subsequent election, furnish the only correct criterion to ascertain the number of qualified voters in the city at the time said special election was held.

V. The case of the State of Missouri v. Julius Winkelmeier, (reported in 35 Mo. 103,) does not militate against the positions here assumed. It is an affirmation of the principle for plaintiff, the Supreme Court having taken the number of qualified votes polled at a general election in St. Louis as a criterion to judge of the number of qualified voters then in said city.

VI. The city council acting upon the evidence of the number of votes polled at said general and special elections, and having sanctioned said ordinance by issuing bonds under it, and due notice of said election having been given, the action of said council is conclusive. At said special election all persons qualified to vote were called upon to do so, and this court will not now listen to objections that two-thirds of the qualified voters of said city did not vote for said ordinance. (People v. City of Rochester, 21 Barb., N. Y., 671.)

HOLMES, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* on the mayor of the city of St. Joseph, requiring him to sign and issue certain bonds of the city. The return admits the facts stated in the petition. By the Act of the General Assembly of Missouri of the 19th of December, 1865, it was provided that the mayor and council of the city of St. Joseph should cause all propositions "to create a debt by borrowing money

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for any purpose whatsoever," to be submitted "to a vote of the qualified voters of said city," and that in all such cases it should require "two-thirds of such qualified voters to sanction the same." In pursuance of this act, the city council passed an ordinance authorizing the bonds of the city to be issued, to the amount of fifty thousand dollars, for the improvement of streets in the city, and making it the duty of the mayor and city register to issue any number of the bonds so authorized to be issued to any citizen or citizens who might be willing to take the same, the proceeds to be applied to the purposes expressed in the ordinance; and it was further provided that the ordinance should be submitted "to a vote of the qualified voters in the city of St. Joseph, on Saturday, the 13th day of January, 1866, at the usual places of holding elections in the different wards of the city," in accordance with the provisions of the charter and laws of the city then in force. On that day an election was held, and it appears by the certificate of the city register that four hundred and four votes were polled, of which three hundred and thirty-six votes were in favor of the ordinance, and fifty-eight votes against it. It appeared also that at the last previous general election held in this city, in April, 1864, the whole number of votes polled was three hundred and thirty-eight.

The only reason given by the mayor for declining to sign the bond in question was, that he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at the special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not. We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined.

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A peremptory *mandamus* will be ordered. Judge Wagner concurs; Judge Lovelace absent.

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CHARLES PERRY *et al.*, Respondents, *v.* JOHN SITER *et als.*,
Appellants.

1. *Equity—Note—Injunction.*—A court of equity will enjoin the collection of a judgment recovered upon a note over-due by parties to whom it has been endorsed for collection only, and who thus hold the legal title, in favor of the maker who has paid or settled the amount due upon the note with the beneficial owners thereof, even as against an assignee of the suit. The assignee is bound to make inquiry into the title of his assignors.
2. *Witness—Note.*—The endorser of a note is a competent witness to prove that the note was endorsed without any consideration paid or given, and merely for collection.
3. *Evidence—Deposition.*—A copy of the testimony given by a deceased witness, upon the taking of his deposition, although signed by the witness himself, is not admissible in evidence when no notice was given of the taking of the deposition, nor opportunity allowed for cross-examination.

Appeal from Platte Circuit Court.

Merryman, Spratt & Burnes, for appellants.

I. The court improperly overruled the objection of defendants to Hart's deposition. (*Caldwell v. Garner*, 31 Mo. 133; *Parrish v. Frampton*, 32 Mo. 397; *Bruce to use, &c., v. Sims et al.*, 34 Mo. 246; *R. C. 1855, § 6*, pp. 1577-8.)

II. The court improperly overruled defendants' objections to Hooper's deposition. (See authorities above cited.)

III. The court improperly overruled defendants' objections to Cummings and Clayler's deposition relating to the affidavit or deposition of Williams. There is no evidence proving, or tending to prove, that Williams' original deposition was taken in conformity to law.

IV. The court improperly admitted in evidence the copy of Williams' deposition. There is no evidence that the original was taken according to law, or that it was lost, or that plaintiffs had made any effort to find it. No foundation was laid for the introduction of the copy. (1 *Greenl. Ev.* § 558.)

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V. The judgment on the evidence should have been for defendants. (Strong v. Hopkins, 1 Mo. 377; Adams' Eq. 460; Simpson v. Hart, 1 Johns. Ch. 97.)

VI. The judgment in the case should have been arrested. The facts stated in the petition do not constitute a cause of action. (See authorities referred to under last point, and Creath, Adm'r, v. Sims, 5 How. 192; Sample v. Barnes, 16 How. 70.)

Points and authorities for respondents :

Hart never was an assignor within the meaning of the act of the Legislature concerning witnesses. That act was only intended to exclude the assignor of a note or an account from testifying in favor of the holder to facts occurring anterior to the assignment. It was never intended that he should be excluded from testifying in favor of the adverse party in interest if called on by such party; if so, a man could always defeat a defence to a note payable to himself by assigning it to a third person, and thereby depriving the defendant from the right to call on him to testify. (R. C. 1855, §§ 3 & 6, p. 1577; Parrish v. Frampton et al., 32 Mo. 396.)

The evidence given by the witnesses did not tend to change the nature or effect of the words used in the assignment, but only showed the consideration for which the assignment was made and the object of the assignment, which is admissible even in reference to instruments under seal or deeds.

The case being clearly a case where a court of chancery would interfere to prevent a great wrong and grant an injunction, the judgment of the court below should be affirmed. (Thomas v. Brashear, 4 Mo. 65; Teryer v. Avstell, 2 Stew. 119; Norton v. Wood, 22 Wend. 520, and cases cited; Pickett v. Morris, 2 Wash., Va., 255; Hord v. Dishman, 5 Call. 279; Matson v. Field et al., 10 Mo. 100.)

In this case Perry was prevented from making his defence at law by the act of the defendant, or of the real party in interest in the transaction. Perry had no right to suppose

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that Belt, Coleman & Co. would fraudulently set up claim to the debt paid by him. (Taylor v. Wood, 2 Hay. 332.)

HOLMES, Judge, delivered the opinion of the court.

This was a petition in the nature of a bill in equity for an injunction to restrain the execution of a judgment at law. On a final hearing, the injunction was made perpetual. The principal matter to be decided is, whether the evidence in the case sustained the decree that was rendered in the court below. There are also some questions relating to the admissibility of evidence, which will be considered in the proper place. The most material facts may be stated as follows:—The plaintiffs had executed a promissory note to the firm of Hooper & Williams of Great Salt Lake City, in Utah, drawn payable to them. This note was endorsed in blank, and sent to their agent in the city of St. Louis for collection at a banking-house where it was made payable. Being protested for non-payment, the agent at St. Louis, under instructions from the owner of the note, sent it to the firm of Belt, Coleman & Co. of Weston, Mo., endorsed in blank for collection, where it was put in suit by them, in their own names, against the makers, the plaintiffs herein. The petition alleges that these endorsements were made for the mere purpose of collection, for the benefit of the payees, and without any valuable consideration moving from the endorsees or either of them. The answer denies this, and avers that the assignments were severally made for a valuable consideration, and that all interest in the note was transferred to the said firm of Belt, Coleman & Co. The evidence that was admissible and competent on the part of the plaintiffs would seem to have been amply sufficient to establish the fact that the endorsements had been made for the purpose of collection only; and no evidence was introduced by the defendants to prove the contrary. There is nothing in the evidence to show that any actual consideration was paid by this firm for the note. It appears that the payees of the note had been indebted to that firm on a note of some four thousand dollars, which had been sent to an

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agent in Utah for collection, and that the note had been there paid and taken up, leaving no other indebtedness between the parties unsettled, and that this was done sometime in the fall of the year 1858. Judgment was obtained in the suit against these plaintiffs, in the Weston Court of Common Pleas, on the note, in favor of Belt, Coleman & Co., for the sum of fourteen hundred and ninety-six dollars and fifty-six cents, on the 18th day of October, 1858. In the meantime, the plaintiffs had paid some part of the debt, and had entered into an arrangement with the payees in Utah, the result of which was that a letter of instructions was addressed by them to the attorneys having charge of the suit, whereby they were directed to send the note or the judgment (if one had been obtained) to them for final settlement there. The attorneys declined to do this; and it further appears that Belt, Coleman & Co. being largely in debt to the firm of Siter, Price & Co. of Weston, and claiming or pretending to be the holders of this note for a valuable consideration paid by them, executed and delivered to them a written paper dated the 8th of September, 1857, whereby they purported to assign to them all their right and interest in this note and the judgment that should be obtained on it, "for value received." One of the attorneys, who fairly admitted that he was interested indirectly in the result of this suit, stated that the assignment was made to satisfy the indebtedness of Belt, Coleman & Co. to the other defendants. He also stated that Thomas S. Williams, in his lifetime, admitted to him that the proceeds of the note were to be applied to the payment of the note of four thousand dollars then due from Hooper & Williams to Belt, Coleman & Co.; but when that note was fully paid off, all right on their part to make such an application of the note in question here would certainly cease, even if any such right had existed before. The note was over-due, and if the firm of Siter, Price & Co. did not have actual knowledge of the fact that the note was in the hands of Belt, Coleman & Co. for the purpose of collection only, and was in suit for the benefit of the real parties in interest,

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they were at least bound to make inquiry into the title of their assignors, and to see that they had a lawful right to make that disposition of the note.

It is not the case of negotiable paper endorsed for value without notice, before due, whether for an actual and valuable consideration paid, or in payment of a pre-existing debt. The note itself is not delivered; the judgment is not assigned, but only the suit, with authority to receive the proceeds on execution; and execution is now taken out in the names of Belt, Coleman & Co., the agents of the payees, to their use. These agents became insolvent. The plaintiffs had made an arrangement with the payees, the real parties in interest, for the settlement of the balance that remained due upon the note; and these insolvent agents and their attorneys refuse to obey express instructions from them to send the note or the judgment to them for that purpose, but proceed to take out execution on the judgment to the use of the parties who have no just or lawful title to the money. The evidence does not show that the plaintiffs had fully paid the note, but it does show that they had made a satisfactory arrangement with the payees, the real owners; and this execution was issued in violation of their express instructions. Not to stay this execution would be to allow a fraud to be consummated, and to compel an innocent party to pay a debt twice.

It is claimed on the part of the defendants that the plaintiffs had had an opportunity to make the defence of payment on the trial at law; and that, having failed to do so, they cannot now invoke the aid of a court of equity for relief, which would be equivalent to the granting of a new trial. And if the case were, that the real parties in interest in this judgment were now seeking to enforce it by execution against these plaintiffs, denying payment altogether, it might very well be held that they had lost by their negligence all title to equitable relief; and such would be the situation of the defendants here if they had shown themselves to be *bona fide* owners of this judgment, or purchasers for a valuable consideration, without notice or knowledge of such facts and

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circumstances as ought to put an honest man upon inquiry. But the record does not show that the matter has been tried at law, nor that the plaintiffs have ever had an opportunity to make proof of the payment of the debt, or any part of it. It appears that for this purpose the defendants offered in evidence, against exceptions of the plaintiffs, a copy of the petition and answer in the suit at law, but nothing more. This was not enough : the whole record should have been offered.

But, in the view we had taken of the case, the result would be the same even if such a record appeared. We place the plaintiffs' title to redress on the ground of fraud. They are entitled to have the defendants enjoined from making a fraudulent use of legal process to their injury by enforcing execution against their property for a debt which is shown to have been paid, at least in part, and to which the defendants are proved to have no title in law or equity.

We have not regarded the testimony of Thomas S. Williams as admissible. The deposition was proved to be a duplicate of the original, signed by the witness himself, containing what was sworn to by him, and it appeared that he was since deceased. But it does not appear that the other party had any notice of the time and place of the taking of the deposition, nor that there was any opportunity for cross-examination ; and the deposition is not certified as the law requires, but as an affidavit merely. This evidence was clearly inadmissible, and should have been excluded. The objections were not waived.

Objections were made to other depositions on the ground that the witnesses were endorsers of the note and were prior assignors, and that they spoke of facts or transactions which took place anterior to the several assignments. So far as this objection was true in fact, it was well taken ; but this would not exclude the more material facts of the testimony, if the objections were fully admitted.

It was further objected that an assignor of a note endorsed in blank for collection merely could not be a witness to prove that fact, or that there was no actual consideration moving

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from the assignee that would create a beneficial interest in him, for the reason that the statute which provides that no "grantor, vendor, or assignor, in any deed, instrument or writing affecting property, real, personal or mixed, or any claim or right therein or therefrom, shall be a competent witness to alter, change, or qualify, the proper effect and operation of the words and terms of such deed, instrument, or writing," (R. C. 1855, p. 1578, § 6,) would exclude such evidence. We are not aware than any decision has gone so far. A blank endorsement carries with it authority to the endorsee to fill up the blank with an assignment in full to himself, and it imports a valuable consideration so far as to vest the legal title to the note in the assignee. It makes a *prima facie* case only. The beneficial interest depends upon the actual consideration; and that is an extrinsic fact. An inquiry into that fact would not necessarily involve any alteration, change, qualification, or contradiction of the words and terms of the written instrument. They stand for what they are; and while they vest a legal title, it may still be true that the whole beneficial interest and the actual ownership is in another. The statute seems to have been based upon the general principle of law, that parol evidence shall not be admissible to vary, alter, or contradict, a written instrument. Its object would seem to be to deprive an assignor of the power of destroying by his evidence the effect and operation of his own written instrument. We see no reason for extending the force of the statute beyond its plain and obvious purport; nor do we think it was intended to apply to a mere endorser of a note in blank for collection only. Such a construction might go far to enable an unfaithful agent to defraud his principal.

There were some other objections to the several depositions which it is not deemed material to notice. On the whole record, though some points have not been free of difficulty, we have not found any substantial grounds on which we could venture to declare the judgment of the court below erroneous in respect of the relief granted; and we are in-

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clined to think the just rights of the parties will be more equitably adjusted by allowing the decree to stand.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

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STATE TO USE OF HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Respondent, v. ROBERT SHACKLETT *et al.*, Appellants.

Revenue—Officer—Action.—The securities upon the official bond of the sheriff are liable to an action for the wrongful act of the sheriff as collector of revenue in levying upon property to enforce the payment of taxes illegally assessed upon property not subject to taxation. (See Hann. & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550.) If the property be not subject to taxation, the collector is a trespasser if he levy the tax, in the same manner as an officer would be in enforcing the process of a court having no jurisdiction of the subject matter.

Appeal from Marion Circuit Court.

Vories & Vories, for appellants.

The plaintiff and appellee cannot recover in this case.

The suit is brought on the collector's bond, and the sureties cannot be made liable in such case unless it is upon a breach of some specific condition or requirement of the bond. In this case, both by the law and by the conditions contained in the bond, as well as by the process or tax book placed in his hands, the collector was required to levy and collect the taxes therein assessed and set forth. The subject matter of levying the taxes was in the jurisdiction of the assessor and others, whose business it was to assess the same and place the tax book in the collector's hands. The collector and his sureties could not therefore be made liable for any errors previously committed by others. The process in the hands of the collector will be justification to the defendants. (Brown v. Henderson, 1 Mo. 134, and cases there cited.)

And the illegality of the prior proceedings on the part of

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the assessor and others would not excuse the collector for failing to collect the taxes as set forth in the tax book and the precept to him delivered. (Kellar v. Savage, 17 Me. 444; s. c. 20 Me. 199.)

The liability of the sureties of a collector on his official bond depends upon the legal construction of the conditions of the bond. Their liabilities cannot be extended by implication or construction, but are limited to the very acts or obligations provided for by the language of the bond; and as the collector in this case has simply discharged a duty imposed upon him by both the law and the bond, no breach has been committed and no action will lie. (Foxcraft v. Nevens et al., 4 Greenl. 72.)

The collector's sureties are protected by the tax book as process in his hands, and cannot be held liable for the errors of others. (Caldwell v. Hawkins, 40 Me. 526, and cases cited.)

In such case if the taxes were illegally assessed, the action would be assumpsit for money had, &c., or an action against the assessor to recover damages for his illegal act. (Ford v. Clough, 8 Me. 334; Smyth et al. v. Titcomb, 31 Me. 272; 9 Johns. 369; 7 Johns. 179.)

Carr, for respondent.

I. The property of the relator being exempt from taxation in the manner pursued in this case, as was decided by this court in the case of the Hannibal and St. Joseph R.R. Co. v. Shacklett, (30 Mo. 550,) the assessor had no *jurisdiction* over such property to assess it; and having no jurisdiction over the relator's property, the fact of going through the *form* of assessing it could impart no validity to the assessment, so as to authorize the collector, or even to justify him in enforcing an illegal assessment, any more than a title can be imparted by a *bona fide* purchaser to a horse which had been stolen. The assessment was *coram non judice*, and hence void. Of this fact the collector was bound to take no-

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tice at his peril. He was just as much bound to know the law as the relator, or any private citizen. 1. The assessment was void upon its face. (*Finn v. Commonw.* 6 Barr, Pa., 460; *Greenon v. Raymond*, 1 Conn. 40; *Allen v. Gray*, 11 Conn. 95, and long list of English authorities there cited; *Connor v. Commonw.* 3 Binn. 38; *Toof v. Bentley*, 5 Wend. 276; *Commonw. v. Kennard*, 8 Pick. 133; *Bond v. Ward*, 7 Mass. 123; *Wetmore v. Campbell*, 2 Sanf. 341; *Osgood v. Clark*, 6 Foster, 307; *Osgood v. Blake*, 1 Foster, 550; *Henry v. Sergeant*, 13 N. H. 321; *Perry v. Bass*, 15 N. H. 322; *Pickering v. Pickering*, 11 N. H. 146; *Pickering v. Coleman*, 12 N. H. 149.) 2. Even if the assessment was not void upon its face, *the notice to the collector, and payment under protest*, were sufficient to put him on inquiry, and make him a trespasser in attempting to collect the taxes. (*Elliott v. Swartwout*, 10 Pet. 137, and authorities there cited; *Hearsey v. Pruyn*, 7 Pet. 179; *Ripley et al. v. Gelston*, 9 Johns. 201; *Fry v. Lockwood*, 4 Cow. 454.)

II. The legal liability of the sureties on the collector's bond is commensurate with that of their principal. That their principal is legally liable has already been decided in the case of the *Hannibal and St. Joseph R.R. Co. v. Shacklett, supra*. (*State v. Moore*, 19 Mo. 369; *State v. Farmer*, 21 Mo. 160; *Rollins et al. v. State*, 13 Mo. 437; *Carmack v. Commonw.* 5 Binn. 184; *Commonw. v. Stockton*, 5 Mon. 192; *Ganbor v. Commonw.* 7 Barr, 265; *Musselman v. Commonw.* 7 Barr, 240; *Evans v. Commonw.* 8 Watts, 398; *Masser v. Strickland*, 17 Serg. & R., 354; *Lloyd v. Barr*, 11 Pa. St. R. 42.)

It will be perceived from an examination of the foregoing cases, that the doctrine of *estoppel* is applied to the sureties to the fullest extent. This grows out of the relations which the parties bear to each other. The sureties, by signing the bond of the collector, thereby agree to pay, if he does not, all damages resulting from any illegal act of their principal, done *colore officii*; and since the principal has fixed upon himself

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a clear legal liability in this case by his illegal act, it does not lie in the mouth of his sureties to repudiate their legal liability therefor.

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted in the Marion county Circuit Court on the relation of the Hannibal and St. Joseph Railroad Company against Robert Shacklett and his securities, on an official bond. It appears from the record that Shacklett was sheriff and *ex officio* collector of Marion county, and that the breach alleged was levying on and advertising for sale and coercing the payment of taxes on property belonging to the relator, and not subject to taxation. The property was assessed by the assessor of Marion county, and a certified copy of the tax book, as the law directs, was duly delivered to Shacklett as collector, for which he gave his receipt. The relator insisted that the property was exempt from the payment of the taxes imposed, and refused to pay the same; whereupon Shacklett levied on a large quantity of rolling-stock belonging to the relator's road, and advertised it for sale to satisfy the taxes assessed against it. The relator then, to regain possession of the property, paid the amount claimed under written protest, and also gave the collector notice in writing that it would commence suit for the repayment of the money. Accordingly suit was instituted, and the court decided that the property was not subject to taxation, and that the assessment was unwarranted by law and a nullity, and judgment was therefore rendered against Shacklett in favor of the relator for the amount of money so collected. (Hann. & St. Jo. R.R. Co. v. Shacklett, 80 Mo. 550.)

The relator failing to make the money on the judgment obtained against Shacklett, has brought this suit against the sureties on his bond, for the purpose of getting satisfaction of the demand.

It is contended by the appellants that the action cannot be maintained; that the tax book furnished a full justification to

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the collector, and that the law peremptorily required that he should proceed to the collection of the taxes in the manner he pursued, and that he could not go behind the books to inquire into the validity of the assessment; and also that the sureties cannot be held liable, as he was pursuing the plain line of his duty, and executing the mandates of the law, and that his action, therefore, amounted to no breach of the conditions of his bond. The general rule is that the tax books, when regularly certified and authenticated, afford the same protection to the collector in collecting the taxes therein assessed, that a judgment at law does to the sheriff in enforcing an execution issued thereupon.

Now, where the court has no jurisdiction of the cause, there the officer is not obliged to obey, and if he does, it is at his peril, though he do it by virtue of an execution, or other process directed to him, a void authority being the same as none at all. And a sheriff is bound to inquire into the authority of a court that issues a writ, and he is liable for executing it when it is issued by a court having no jurisdiction. (Brown v. Henderson, 1 Mo. 134; Mayor v. Morgan, 7 Martin, N. S., 2; 8 Bac. Abr. 691; case of the Marshalsea, 10 Coke, 160; Brown v. Compton, 8 T. R. 424.)

The officer is bound to know the law, and if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril and will not be protected. Here the assessment was illegal. Its illegality was apparent on the very face of the tax books placed in the collector's hands, as much so as if it had purported to have been made on the court-house, or other property which the law expressly exempts from taxation. But since the decision in this court, this is no longer a disputable question. It is conclusive against Shacklett and his sureties on the bond. (McLaughlin v. Bank of Potomac, 1 How. 220; 17 Curt. 97; King v. Chase, 15 N. H. 9; Parkhurst v. Sumner, 23 Vt. 538; Evans v. Com., 8 Watts, 398; State to use, &c., v. Coste, 36 Mo. 437.) The question now remaining to be considered is, can the sureties be held liable in this proceeding?

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The bond contained the following conditions: "That if the said Robert Shacklett should faithfully and punctually collect and pay over all the State and county revenue for the two years next ensuing the first day of September next, 1858, and until his successor shall be elected and qualified, and that he would in all things faithfully perform the duties of collector according to law, then said written obligation was to be void and of no effect."

Can it with truth or propriety be alleged that when the collector placed himself in the attitude of a trespasser, and wrongfully collected money on property not subject to taxation, that he was faithfully performing the duties of collector according to law? The collector is entrusted with vast powers and important responsibilities, and the law has deemed it advisable to require that he should give sufficient security to secure his good conduct, or to indemnify those who may suffer in consequence of his neglect or malfeasance.

Judge Scott pointedly remarks: "It would be hard if a sheriff, by virtue of the process placed in his hands, should oppress or ruin individuals, and they should have no other security than his own resources. He may be insolvent, and unable to respond in damages out of his own estate. Such a condition of things would drive men to a resistance of the execution of the process of the law." (State v. Moore, 19 Mo. 372.) A surety on an official bond is responsible for all moneys which come into the hands of the officer while in office, and which he subsequently fails to account for and pay over. (Bryan v. The United States, 1 Black, U. S., 140; 12 Wheat. 505.)

When an officer tortiously seizes goods, it is not merely a private trespass but a breach of his bond; and a person whose goods are thus wrongfully seized, shall have an action against him and his sureties on his official bond. (State v. Moore, 19 Mo. 372; 21 Mo. 160; The People v. Schuyler, 4 Comst. 173; Archer v. Nobb, 3 Greenl. 418; Harris v. Hanson, 11 Me. 241; Cormack v. Com. 5 Binn. 184; Com. v. Stockton, 5

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Mon. 192 ; Phillips v. Harris, 3 J. J. Marsh. 122 ; Potts v. Com. 4 J. J. Marsh. 202 ; Forsythe v. Ellis, 4 J. J. Marsh. 298.)

The judgment is affirmed. Judge Holmes concurs ; Judge Lovelace absent.

GIDEON NORRIS, Respondent, *v.* HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

Revenue Stamps—Justices' Courts.—The act of Congress does not require that a stamp shall be affixed to the certificate of a justice of the peace certifying an appeal to the Circuit Court. The appeal is not an original process under our statutes.

Appeal from Linn Circuit Court.

Hall & Oliver, for appellant.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff recovered a judgment against the defendant before a justice of the peace, from which the defendant took an appeal to the Circuit Court of the county of Linn. The Circuit Court, on motion of the plaintiff, dismissed the appeal for the reason that there was no U. S. revenue stamp affixed to the certificate whereby the justice had certified the transcript to be a true copy of the record and proceedings before him. The certificate was dated October 15, 1863. The act of Congress then in force on the subject of revenue stamps does not seem to have required stamps upon any other "legal documents" than a "writ or other original process by which any suit is commenced in any court of record." (U. S. Statutes of 1861-2, p. 483.) The act of Congress of July 4, 1864, only required a stamp on a "writ or other process of appeals from justices' courts" to a court of record. This certificate is neither a writ or process of any kind. Nor does this certificate belong to the class or kind of certifi-

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cates which were contemplated in another part of the same act (p. 484). It is a part of the legal proceeding in the cause ; and the act of Congress by specifically naming under the head of "legal documents" as are subjects of revenue stamps the "writ or other original process" only, would seem very clearly to exclude any and all other parts of the legal proceedings in a cause. This will be sufficient to dispose of the question before us without our undertaking to inquire into the constitutionality of an act of Congress which seeks to impose a revenue tax upon the legal process of a State court : a question on which it is not necessary for us to express an opinion.

The judgment is reversed and the cause remanded.

Judge Wagner concurs ; Judge Lovelace absent.

JOSEPH SMITH, Respondent, *v.* THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroads—Negligence—Damages.*—In an action for damages against a railroad, for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff, to show that the fire was caused by the negligence or want of care of the defendant. There is no legal presumption of negligence in such cases ; it must be shown as a matter of fact.
2. *Practice.—Instructions.*—Where, at the close of the plaintiff's case, there is no evidence proving the defendant's liability, the defendant has the right to ask the court to instruct the jury to find for the defendant. (Clark's *Adm'x v. Han. & St. Jo. R.R. Co.*, 36 Mo. 202, No. 4.)

Appeal from Buchanan Common Pleas.

Carr, for appellant.

- I. An action does not lie for a reasonable exercise of one's right, though it be to the injury of another. (Philad. & Read. R.R. Co. v. Yeiser, 2 Am. R.R. Cas. 325, and authorities there cited; s. c. 8 Barr, 366; Burroughs v. Housat. R.R. Co., 2 Am. R.R. Cas. 30 ; s. c. 15 Conn. 124 ; Rood v. N. Y. & Erie R.R. Co., 18 Barb. 80.)

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The evidence adduced on behalf of the appellant shows beyond a reasonable doubt that the change of engines was manifestly for the better; that there was a great deal less danger from sparks and fire being communicated to property along the line of the road from these coal-burning engines, constructed on that plan of appellant's, than there was from the old fashioned wood-burning engines. The appellant not only had the right to make the change, but it was for the benefit of the people living and owning property along the line of the road to make the change.

II. The allegation in the respondent's petition is that the appellant was guilty of negligence. The *onus probandi* was on him to show beyond a reasonable doubt that the appellant was guilty of *negligence*. The appellant being engaged in the exercise of a lawful right, the law will not presume it was guilty of negligence in the exercise of its rights merely from the fact of the burning up of the apple-trees and fencing sued for. The respondent must prove positive negligence before a jury is authorized to find a verdict against the appellant. This the respondent utterly and totally failed to do. The court below erred, then, in not setting aside the verdict rendered in this case. (Philad. & Read. R.R. Co. v. Yeiser, 2 Am. R.R. Cas. 325; Burroughs v. Housat. R.R. Co., 2 Am. R.R. Cas. 30; Rood v. N. Y. & Erie R.R. Co., 18 Barb. 80.)

III. The respondent was guilty of *negligence* himself, in not plowing around his orchard, and particularly in not plowing along that side next to appellant's railroad, so as to prevent fire from running over his orchard. A little precaution on his part would have prevented his orchard from being burned. He was guilty of gross negligence in suffering dry weeds and tickle-grass to accumulate along the run of locust-trees in a windrow three or four feet high, close to the appellant's railroad, on his own land. Even if it were true that the appellant were guilty of negligence, in running its engines as alleged, the respondent was likewise guilty of negligence in the manner aforesaid, and in this case, having

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contributed to his own injury, cannot recover. (*Wynan v. Ulland*, 5 Watts, 524; 8 Barb. 376; *Penn. R.R. Co. v. Aspall*, 23 Penn. 147; 14 Barb. 585; *Hartfield v. Roper*, 21 Wend. 615; *Ang. on Carr.* 335, 564-5; *Smith v. Hardy*, 31 Mo. 412; *Reeves v. Larkin*, 19 Mo. 192; *Whit. Pr.* 689-93; *Willis v. R.R. Co.*, 32 Barb. 398; *Cityman v. N. Y. & Harl. R.R. Co.*, 2 N. Y. 472; *Huelsenkamp v. Citiz. R.R. Co.*, 34 Mo. 45.)

Farnsworth, for respondent.

The court properly gave the instructions one, two, three and four asked by the plaintiff, numbers one, two and four being predicated solely on the carelessness of the defendant and its agents, number three on the presumption arising from the setting fire to the plaintiff's farm by the defendant's engine.

Negligence or want of care is a question to be determined by a jury. (2 Am. R.R. Cas. 114.) The care required of plaintiff is that degree of care which may be reasonably expected from one in his situation. (2 Am. R.R. Cas. 389, 328, 836, 351, 114; 22 Mo. 374.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiff produced evidence showing that in the spring of 1864 his orchard and fences had been destroyed by fire, and the amount of the damage; that a short time after a train of cars had passed on the railroad, going west, a fire was seen in the dry grass among locust-trees standing thick along the orchard, and some forty or fifty feet north of the railroad; and that a high wind blowing from the south carried the fire directly into the orchard; that, at the same time, two small boys were engaged in burning piles of corn-stalks in several places to the south of the railroad and orchard, one of them within about sixty yards of the railroad; that no one actually saw how the fire originated, but a son of the plaintiff, who was plowing in a field at some distance, out of sight of the orchard, and saw the fire soon

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after it began, thought it arose from sparks from the engine; and another son, a boy of twelve years of age, who was standing, at the time he first saw the fire, some two hundred yards away from the nearest pile of burning stalks, thought no sparks flew from them. Other witnesses stated that prior to 1861 engines with wire gauze bonnets, or spark catchers, on chimneys with flaring tops, were used on the road; but that since that time engines with straight-topped chimneys, without any visible bonnet, or spark arrester, had been in use, the internal construction of which they did not appear to know; but one of them thought sparks came much freer from these last. It appeared also that no fires had been set by engines before in that neighborhood.

This being substantially the state of the plaintiff's case, the defendant's counsel asked the court to instruct the jury to find for the defendant. The court declined to pass upon the instruction, unless the counsel would then submit the case to the jury. It was decided in Clark's Adm'x v. Han. & St. Jo. R.R. Co. (36 Mo. 202) that it was proper for the court to pass upon such instructions when asked at the close of the plaintiff's evidence.

On the part of the defendant, the evidence showed that prior to 1861 the company have used wood-burning engines, with wire gauze bonnets, or spark catchers, on the chimneys, but that since that year they had used instead coal-burning engines with straight chimneys, and with sub-treasuries, or spark receivers, (being an extension of twenty-one inches in the smoke box,) for the purpose of arresting sparks and cinders; that the coal burning-engines were safer against damage from sparks than the other; that they emitted no sparks unless worked hard, or the receiver was full; that the engineer could tell when the receiver was full; that to the east of this farm the grade, going west, was slightly ascending, and that nearly opposite the house and orchard it began to be strongly descending; that little steam was used in approaching the farm; that it was shut off altogether about opposite the house, and that the engines passed through the

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farm with little or no steam on. It appeared that the company were well supplied with coal, and further that there was a hedge of locust-trees along the railroad, and between the railroad and the orchard, on the edge of plaintiff's land ; that a windrow of dry grass and weeds had been blown up by the wind against the locust-trees, and that stacks of hay had been known to catch fire from piles of burning cornstalks at a distance of two or three hundred yards.

The defendant also offered to prove that the engineers employed on that division of the road were skilful and careful men, and that the builder of the engine used on this occasion was a skilful mechanic. This evidence was excluded. We think it might properly have been admitted.

The defendant excepted to the ruling of the court allowing witnesses to give their judgment as to the value of the trees destroyed, without first stating that they knew their value. We see no material error in this.

The main question here is nearly the same, whether considered as arising upon the instruction which was refused for the defendant at the close of the plaintiff's evidence, or upon the third instruction given for the plaintiff when the case was submitted to the jury. The defendant's evidence tended to show that the change of engines, made in 1861, had been rather for the better than the worse, in respect of danger from sparks, and to strengthen the possibility that the fire might have been communicated from the burning cornstalks rather than from the engine. We cannot say that there was any evidence before the jury which tended to show actual negligence on the part of the defendant, and the plaintiff was not entitled to recover, unless the proposition can be maintained, that from the mere fact that a fire was set by sparks from the engine, and damage done, "the presumption is that said fire escaped by the negligence of the defendant or its agents." The instruction seems to propound a conclusive presumption of law in reference to the issue, and a kind of disputable presumption of fact in reference to the matter

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of negligence. The question presented is, whether these facts amount to a *prima facie* case of liability on the ground of negligence.

There are no statutes in this State which declare that any such state of facts shall constitute a presumptive or *prima facie* case of liability, nor does this belong to a class of cases in which there are any special presumptions of law or fact arising out of the peculiar relations of the parties or privity of contract. Presumptions of fact are mere arguments at best, and are only such as would warrant a jury in inferring the fact of negligence from the other facts proved, in the ordinary course of reasoning, according to the natural and proper relations of things, and the common sense and experience of mankind. (1 Greenl. Ev. §§ 44, 48.) It is not apparent how, by any rational process of thinking, a jury could draw the conclusion, from the facts proved here, that the defendant has been guilty of actual negligence. The more reasonable presumption would rather seem to be that the fire had occurred by accident or mischance. On the other hand, there would seem to be like ground for a presumption equally strong that the fire had been set by sparks from the burning cornstalks, and that there had been negligence on the part of the plaintiff.

The allegation is not merely of a fire and damage by sparks from the engine, but that the whole thing was caused by the negligence of the defendant, and on this the issue is taken. The negligence is thus made to be the substance of the issue. It is the whole ground and very gist of the action, and it must be proved as laid. It is a familiar rule that the proofs must correspond to the allegations. It is not enough that a part of the facts involved in the inquiry are made to appear. The whole issue must be proved, and the burden of proof is on the plaintiff. If he failed to prove the whole issue, he comes short of making out a *prima facie* case, and the jury should be instructed to find for the defendant.

Negligence, in itself, is a matter of fact, and where it is involved in the issue, and there is any evidence tending to

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prove it, it is always a question of fact for the jury to decide. Of course, where the statute creates a liability, independent of negligence, as for killing cattle where no fences had been built, the matter of negligence, when these facts are shown, is made a conclusive presumption of law by force of the statute, and it is not involved in the issue in such cases. (Gorman v. Pacific R.R., 26 Mo. 441.) So when the statute makes the fact of a fire and damage by sparks from a railroad engine a *prima facie* case of liability without more, the burden of proof is thrown wholly upon the defendant, to show, as a matter of defence, that there was no such negligence on his part as would make him liable, and in such case it is not involved in the affirmative of the issue. (Balt. & Susq. R.R. v. Woodruff, 41 Md. 242; Chapman v. Atl. & St. Law. R.R. Co., 37 Me. 92.) In cases of carriers of goods, the question of negligence is disposed of as a presumption of law, conclusive or disputable by the general law of carriers, resting on the peculiar relations of the parties and the privity of contract; but in the case of a carrier without hire, there is no such presumption, and the burden of proof is on the plaintiff to show negligence. (Ang. on Carr. § 61.) Carriers of passengers, again, though not insurers, and not subject to the same presumptions of law as carriers of goods, are still held responsible for the utmost degree of care and diligence, and are liable for the slightest neglect, depending on the peculiar relation of the parties and privity of contract; and, accordingly, it is the established rule in such cases that when an injury results to a passenger from the breaking of carriages or cars, or from defective machinery, the mere fact of an accident and injury from such cause is held to be presumptive evidence of negligence; that is, the jury may infer from these facts that slight degree of negligence which makes the defendant liable. (Ware v. Gay, 11 Pick. 106; Sto. Bail. § 601.) But even in that class of cases, if the plaintiff's evidence shows that the accident was the result of internal defects not discernible, or deficiencies unavoidable by the exercise of the utmost care and diligence, it fails to furnish

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any proof whatever of negligence, and there is no presumption of law or fact concerning it; it is a misfortune which the sufferer must bear; and without more the jury would be instructed to find for the defendant. (Ingalls v. Bills, 9 Metc. 1; 2 Greenl. Ev. § 222.)

¶ But in all that class of cases where no statute interferes, and no peculiar relation or privity of contract exists, and the parties stand in the position of strangers, with only those rights and mutual obligations which belong to all neighbors and persons alike, in the use and enjoyment of their own property, and in the conduct of their own lawful business, and negligence is the ground of action, the burden of proof is always on the plaintiff; the fact of negligence must be proved, and there is no such thing as a presumption of negligence as a matter of law without proof of the fact, and no other presumption of fact than such as belongs to the proper force and the rational weight of the evidence, of which, when there is any, the jury is to judge, under the instructions of the court. This rule was applied in the case of Schultz v. Pacific R.R., 36 Mo. 13.

¶ There does not appear to be any well grounded difference in the principles and rules applicable to these particular cases of accident and damage by sparks from railroad engines. Reasonable care, skill, diligence and foresight only are required; that is, such as might be expected of careful, skilful and prudent men in like situations and circumstances; and the same is required of both parties alike. The old maxim, "*Sic utere tuo,*" etc., applies equally to both; and they are alike responsible for ordinary negligence or want of reasonable care, skill and prudence. (Vaughn v. Menlave, 4 Scott, 244; Beers v. Housat. R.R. Co., 19 Conn. 566; Balt. & Susq. R.R. Co. v. Woodruff, 4 Md. 242.) There are not only different degrees of negligence in different classes of cases, but it is always in some measure relative to the nature of the facts and circumstances in each particular case. (Philad. & Read. R.R. Co. v. Spearen, 47 Penn. 300.) But here, as in all other cases of this kind, negligence is the

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ground and gist of the action, is of the substance of the issue, is a question of fact for the jury, and must be proved, and the burden of proof is always on the plaintiff. (Batchelden v. Hoagan, 18 Me. 32; Rood v. N. Y. & Erie R.R. Co., 18 Barb. 80; Hinds v. Barton, 25 N. Y. 544.) And it is not to be presumed or inferred from the bare fact of a fire set by sparks from the engine, and a damage done to the plaintiff, nor from any other facts which do not of themselves necessarily import and show actual negligence. (Philad. & Read. R.R. Co. v. Yeiser, 8 Barr, 366; Burroughs v. Housat. R.R. Co., 15 Conn. 124; Rood v. N. Y. & Erie R.R. Co., 18 Barb. 80; Hurgett v. Philad. & Read. R.R. Co., 23 Penn. 373; Maule v. Wilson, 2 Harr. 443; Macon & H. R.R. Co. v. McConnell, 27 Ga. 481; Sheldon v. Hud. Riv. R.R. Co., 29 Barb. 227; s. c., 14 N. Y. 218; Herring v. Wilm. & Ral. R.R. Co., 10 Ired. 402.)

The defendant is not liable for mere accident or mischance, nor unless it can be also shown that there was actual negligence which caused or produced the accident and damage. Without the aid of sheer conjecture, or some presumption of law or fact, beyond what the facts proved rationally imported, it is not easy to see how the jury could infer either that the defendant had been guilty of negligence, or that the fire was set by sparks from the engine, rather than from the burning cornstalks. The jury is not to jump at a conclusion without proofs. It has been well asserted that if a liability were to be inferred from the mere fact of a fire and damage, it would make railroad companies insurers against all fires occurring along the road, from whatever cause; and if the same thing were to be presumed from the bare fact of a fire set by sparks from an engine, that would make them liable even for the slightest omission or neglect, or for mere accident or misadventure arising from the act of God, the operation of natural causes, or other circumstances beyond their control, or for the legitimate exercise of their own lawful rights and powers, and for damages within the principle of *damnum absque injuria*. The plaintiff must make out affirmatively a *prima facie* case of liability.

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It seems to be supposed that a different rule prevails in England, which is rather to be preferred on the score of justice and good policy. (Redf. Railw. 357.) Upon examination of the authorities referred to, we do not find any satisfactory ground for this distinction. In Aldridge v. Great Western R.R. Co., (3 Man. & Gr. 515,) the court merely refused to nonsuit the plaintiff on the case made, and it was distinctly intimated that negligence was no more to be presumed from the mere fact of a fire set by sparks, than from the fact that a rick of beans was placed near the railroad, and that "to enable the plaintiff to recover he must show some carelessness, or lay facts before the jury from which it may be inferred." In other cases there was strong proof of actual negligence, as in overtasking the engine and running it without any kind of spark arresters, though such inventions were then in use; (Piggott v. Eastern Counties R.R. Co., 3 Man., Gr. & S. [C. B.] 229; Hammon v. Southeastern R.R. Co., Maidst. Assiz. 1845; Walf. Railw. 182 n. e.) or in running engines which cast forth sparks in a dangerous manner, where the embankment of the railroad was covered with inflammable grasses, weeds and peat, without having taken any steps, on previous notice of the danger, to clear the combustible material from their track; (Vaughn v. Taff. Vale R.R. Co., 3 Hurl. & Nor. 742;) and these cases were not inaptly likened to the old cases of a man riding an unruly horse into Lincoln's Inn Fields, (1 Vent. 295,) or suffering a mad bull, (1 Lutw. 36,) or a biting dog, (2 Str. 1264,) or "a thing intrinsically dangerous" to go at large, with a *scienter*. But it cannot be fairly maintained or assumed that all railroad engines are of that character, or that any particular one is to be brought within that category, without evidence clearly showing the fact to be so, or that there was actual negligence in the manner and under the circumstances in which it was employed on that particular occasion.

In Bass v. Chicago, Burl. & Quincy R.R. Co., (28 Ills. 9,) a demurrer was overruled to a declaration charging that the

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acts complained of had been carelessly and negligently done, and stating a very strong case of actual negligence on the part of the defendant ; and the opinion of the court, while conceding the result of the American authorities, supposes that a more stringent rule prevails in England, and one which was thought to be more in accordance with justice and the policy indicated by the statutes of some States. However this may be, until the Legislature sees fit to change the law on the subject, we must be guided by the established principles governing the case.

In *Ellis v. Portsm. & R. R.R. Co.*, (2 Iredell, 138,) the court below had charged the jury that if they believed the plaintiff's fences were burned by fire from the engines, the defendant was liable ; but on appeal, Gaston, J., expressly declared that the gravamen of the complaint was that the damage was caused by the negligence of the defendant, and that the court did not sanction the doctrine laid down in the charge ; but it was held that when the plaintiff shows damage resulting from an act, which, "with the exertion of proper care, does not ordinarily produce damage, he makes a *prima facie* case of negligence." This case, like that of *Hull v. Sacr. Val. R.R. Co.*, (14 Cal. 387,) in which there was evidence showing that the result was not probable from the ordinary working of the engine, may be said to go to the extreme verge of the law in sustaining a verdict on the ground that there was some evidence to support it ; but they do not justify the proposition that negligence is ever to be presumed in these cases as a matter of law, nor as a matter of fact, without some evidence from which the fact of actual negligence, causing the damage, might rationally be inferred.

It is not always an easy thing to determine what amounts to some evidence, and what to no evidence, sufficient in law to make a *prima facie* case on the issue ; but we are inclined to the opinion that the evidence here failed to cover the whole issue, and that there was no evidence before the jury from which they could reasonably be warranted in finding a

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verdict for the plaintiff; and accordingly the instruction asked by the defendant, at the close of the plaintiff's evidence, should have been given; and the third instruction given for the plaintiff was erroneous, both as not being warranted by the facts assumed in it, and as in effect taking the question of negligence, as a matter of fact, wholly away from the jury.

Of the instructions refused for the defendant, the fifth was objectionable in not leaving to the judgment of the jury the question whether there was any negligence in changing the kind of engines used on the road, as well as the general question of negligence on the whole issue. The seventh was open to a similar objection. The sixth should have been given. The eighth was rightly refused; but an instruction might properly have been given to the effect, that if there was negligence on the part of the plaintiff, which caused or contributed to produce the fire and damage, the jury ought to find for the defendant. But in this we would not be understood as saying that the plaintiff could be charged with negligence in not keeping down the grass in his orchard; but if he negligently allowed dry grass and weeds to be accumulated by the wind against the trees along the orchard on his own land, and near the railroad, it might be left to the jury to say whether there was any negligence which materially contributed to cause the damage.

The judgment will be reversed and the cause remanded. The other judges concur.

MEREDITH BROWN, Respondent, *v.* THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

Practice—Jury—Constitution.—In trials at common law in courts of record, the parties are entitled to a jury of twelve men as a matter of constitutional right, and any consent to waive this right must be entered of record. If such consent do not appear of record, the party may avail himself of the objection by motion in arrest of judgment.

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Appeal from Linn Circuit Court.

Carr, for appellant.

Hall & Oliver, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The respondent sued the appellant before a justice of the peace, in the county of Linn, for damages for killing cattle, and recovered a judgment for the value thereof. On appeal to the Circuit Court of Linn county, there was a trial anew before a jury of six men, and the plaintiff had a verdict and judgment. The verdict appears to have been fully warranted by the evidence, and we find no error in the instructions which were given for the plaintiff, and in refusing those asked for by defendant.

The defendant filed a motion for a new trial, and in arrest of judgment, for the reason, (among others,) that the case had been tried by a jury of six men, without his consent. Both motions were overruled. No consent of the defendant to a trial by a less number of jurors than that to which every party is entitled, on a trial in a court of record, as a matter of constitutional right, appears to have been entered of record.

It has been held by this court that such consent, when given, should always be entered of record, and that the party may avail himself of the objection on motion in arrest, and the same is the case on appeals from justices' courts to courts of common law, when the parties are entitled to a trial by a jury of twelve men, unless the right be expressly waived. (*Vaughn v. Seade*, 30 Mo. 600.) Accordingly, the motion in arrest should have been sustained.

For this reason, the judgment must be reversed and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.

Sullivan County v. Burgess.

SULLIVAN COUNTY, Respondent, *v.* G. D. BURGESS, Appellant.

Practice—Judgment—Equity.—A settlement with a county court is equivalent to a judgment rendered by a court of competent jurisdiction, and will be set aside only when impeached for fraud, by a proceeding in the nature of a bill in equity.

Appeal from Sullivan Circuit Court.

E. B. Ewing, for appellant.

WAGNER, Judge, delivered the opinion of the court.

In *Jones v. Brinker*, (20 Mo. 87,) this court said:—“Since we have no chancery courts, and the distinction between courts of law and courts of equity has been abolished, the party seeking to falsify the allowances and accounts of the settlements of administrators, must nevertheless petition the Circuit Court, as a court of law and equity, for that purpose; and his petition must allege the same grounds now for the action and interference of the Circuit Court, as was formerly necessary to give the courts of chancery jurisdiction.” And in the State to use of *Tourville v. Roland*, (23 Mo. 98,) it was said, “the party seeking to set aside the settlements and allowances in favor of his guardian, must charge that such allowances and settlements were procured by fraudulent and false means and pretences, unjustly, to the injury of the estate and the parties interested.”

A settlement with a county court is equivalent to a judgment rendered by a court of competent jurisdiction, and will only be set aside when impeached by a proceeding in the nature of a bill in equity, for fraud.

The petition in this case charges that the appellant, in his settlement with the county court, as treasurer, procured an allowance in his favor, through fraud and false pretences, for the sum of one thousand dollars. It then specifically sets forth the facts, and avers that the court, relying on his false and fraudulent representations, gave him the allowance, to the great injury of the county; that the representations were

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false and fraudulent, and that he knew them to be so at the time they were made; and asked to have the settlement set aside.

There was a demurrer to this petition, which was overruled by the court.

The petition states facts sufficient to entitle the party to equitable relief, and we see no error in the action of the court in refusing to sustain the demurrer. There is no merit in the objection that there was a variance of parties in the different petitions. The cause was tried on the second amended petition; and as the appellant was the only party declared against in that petition, he was the only party to the suit, and the judgment was proper against him alone. As the appellant rested his cause on the demurrer, and made no application to file an answer, the judgment was properly rendered, and is affirmed.

Judge Holmes concurs; Judge Lovelace absent.

JOHN B. MARTIN AND JOHN B. VAN DUZEN, Plaintiffs in Error, v. JOHN E. BARRON, Defendant in Error.

Estoppel—Judgment—Practice.—If a judgment be erroneous or irregular, it must be reversed or vacated in a direct proceeding instituted for that purpose. In a suit upon the judgment, its conformity to law cannot be inquired into.

Error to Buchanan Court of Common Pleas.

H. M. & A. H. Vories, for plaintiffs in error.

1. It was alleged by the defendant that it was not shown by the record that the defendant was ever served with process, or that he was served in the jurisdiction of the court rendering the judgment. It was objected that the process was issued against J. E. Barron, and that the petition and judgment was against John E. Barron, which rendered it void as against defendant.

The return of the officer and the judgment of the court ren-

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dered in the cause are conclusive evidence, or at least *prima facie* evidence of these facts, and the said record ought therefore to have been admitted as evidence.

It is also the presumption of law, that the marshal has properly discharged his duty, and all presumptions will be made in favor of and not against his return. (Wilson v. Jackson, 10 Mo. 329, and authorities there cited; McNair v. Biddle, 8 Mo. 257; Shumway v. Stillman, 4 Cow. 292, and 6 Wend. 447; Scott v. Coleman, 5 Lit. 350; Williams v. Preston, 3 J. J. Marsh. 600.)

When a transcript of a judgment from a sister State shows that the writ was served by a proper officer and was returned by him as such, but states that it was duly and legally served, the presumption is that it was served in conformity to the law of the place where made. (Lackland v. Prichett, 12 Mo. 484; Blackburn v. Jackson, 26 Mo. 308; Jones v. Relph, 3 Mo. 388.)

The abbreviation of the given name is no objection to this record, as the proof shows that Barron was known by the abbreviated name as stated in the writ, and that he was at the time of the service in the jurisdiction of the court. (Fenton v. Perkins, 3 Mo. 106.)

If the return of the marshal was not regular, a motion to quash might have been made; but as that was not done, and the court where the return was made recognized the return and rendered judgment, the same cannot afterwards be questioned when suit is brought upon the judgment. (Wilson v. Jackson, 10 Mo. 329, above cited.)

Jarvis & Townsend, for defendant in error.

As to the designation of the parties to a suit, the law is substantially the same now that it was a hundred years ago. It is, legally speaking, next to impossible to sue a man by the initials of his name only. The law now is as it ever was about the use of initials, or the total omission of a christian name. (Revis v. Lamme & Bros., 2 Mo. 168.) But in cases of mistake or misnomer, it is never consistent perhaps

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with exact reason, and allows corrections to be made, yet with jealous regard to the rights of the defendant.

If it does not appear by the prior proceedings that notice was served, such cannot be inferred because judgment was rendered; for judgment is the result, the consequence, of prior legal measures that gave it birth. (Smith v. Ross, 7 Mo. 463.)

If a foreign judgment proceeds upon an error of law apparent on its face, it may be impeached everywhere (1 Greenl. Ev. § 547, note 1); or if upon its face it is founded in mistake, or is irregular, or bad by the local law. (*Ib.* 540, note 2; Sto. Confl. Laws, § 607; 2 Phil. Ev. 51.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit founded on a judgment rendered by the Circuit Court of the United States within and for the Seventh Circuit and Southern District of Ohio.

The defendant in his answer pleads *nul tiel record*, and also that the court had no jurisdiction over his person; and for further answer he stated that he did not appear in the suit in which the alleged judgment, described and set out in the petition, is said to have been rendered; that he was not served with process, or notified of the commencement or pendency of the action; that he was not at the commencement of the suit, nor has he been at any time since, resident in the State of Ohio, or within the jurisdiction of said Circuit Court; nor was he at the commencement of the alleged suit personally within the jurisdiction of the said court. And he further alleged and stated that the suit was not prosecuted nor the judgment rendered in his christian name, or other proper appellation by which he was known, designated, or distinguished, but, as appears from the transcript, the suit was prosecuted and the judgment rendered against one J. E. Barron, which is not his proper name and appellation, and by which he was not liable to be sued; by reason of which he avers he was not liable to be sued, and is not the person mentioned in the said transcript.

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There is a marked inconsistency in defendant's answer. In the first place he denies any such judgment as that alleged and set forth in the petition, and in the second place he impliedly admits the record, but seeks to avoid its force and operation by denying that his name is properly set out and designated.

The transcript of the record shows that the declaration was filed, and the judgment rendered, against John E. Barron, in his full proper name; but the writ was issued against J. E. Barron, and the marshal's return states that he served it personally on J. E. Barron. At the trial in the court below, plaintiffs introduced testimony tending to prove that the defendant was in the city of Cincinnati, in the State of Ohio, about the time of the commencement of the suit, and then offered in evidence the transcript of the record, which was rejected and excluded by the court. Plaintiffs then took a non-suit, and after an ineffectual attempt to set the same aside, sued out their writ of error.

The question of the effect and validity of a judgment from another State, under the law of Congress of May 26, 1790, has been so often passed upon by the courts, that it is useless to re-examine it here. The main point relied on in defence is, however, that the defendant being described in the writ by the initials of his christian name, and the officer's return of service being in the same defective manner, there is nothing on the record to show that he was ever served with process, or that the court acquired any jurisdiction over him, and that the proceeding and judgment are void. The christian and surname of both plaintiff and defendant should be set forth with accuracy; for since names are the only marks and *indicia* which humankind can understand each other by, if the name be omitted or mistaken, there is a complaint against nobody. But where service has been read by a wrong name, the misnomer or want of a name is pleadable in abatement only. (1 Bac. Abr. 9; 2 Black. 1120.)

And it seems there is a distinction where a party is described by the initial of his christian name, when he is ar-

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rested on process and affidavit, to hold to bail, and where nothing but the initials are used in merely serviceable process. In the first he will be discharged and his bond cancelled, upon entering a common appearance; in the latter he will be left to his plea in abatement. (4 Barn. & Ad. 536; 6 Barn. & Cr. 165; 6 Moore, 264; 3 Bing. 296; 4 Moore, 317; 1 Bro. & B. 529.) But the defendant is not obliged to take advantage of a misnomer, misdescription, or omission in his name; he may elect to do so or not, at his pleasure; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem persona*. (Smith v. Villers, 1 Salk. 3, pl. 7; Benson v. Derby, 1 Ld. Raym. 249; 2 Stra. 1218.) And when a person is in the habit of using initials for his christian name, and is proceeded against by his initials, and the fact whether he was so known is put in issue, and the jury find in the affirmative, the court will not interfere on that ground. (City Council v. King, 4 McCord, 487.)

In Conkey v. Kingman, (24 Peck. 115,) an application was made for the appointment of a guardian to Susan Conkey, (alleged to be *non compos mentis*,) and the order of inquisition described her as *Sarah* Conkey, but the return of the selectmen, and other proceedings in the Probate Court, contained the true name. It was held that if notice was given to the right person, and there was no mistake as to identity, it would not be a fatal misnomer. But we are not to construe this precisely as we would if the process had issued from one of our own courts. We do not know exactly what effect it may have in the court where rendered. The courts in Ohio will be presumed to know more about their laws, and the force and validity of their own peculiar process, than we can.

Granting that the writ and service were defective, and that the judgment rendered thereon was irregular, can it be impeached and declared void in this collateral manner? Most certainly not. In this collateral action its conformity to law

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cannot be inquired into. If the judgment is erroneous, it should be reversed or vacated in a direct proceeding, instituted for that purpose, in the court where it was rendered. (Grover v. Grover, 30 Mo. 400; Reed v. Pratt, 2 Hill. 64.)

No evidence was offered to show that the Circuit Court sitting in Ohio had not obtained jurisdiction. The record, with the accompanying proof, was at least *prima facie* evidence, and should have been admitted when offered by the plaintiffs.

The judgment will be reversed, and the cause remanded. The other judges concur.

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ANDREW J. BAKER, Appellant, v. JOSEPH F. BERRY AND J. H. BERRY, Respondents.

Practice—Demurrer.—An instrument of writing sued upon, and filed with the petition, constitutes no part of the pleading, and cannot be considered in determining the sufficiency of the pleadings.

Appeal from Putnam Circuit Court.

Vories & Vories, for appellant.

WAGNER, Judge, delivered the opinion of the court.

This was a suit founded on a promissory note, brought in the name of the assignee. The petition averred that the payee of the note assigned by endorsement and delivered the said note to plaintiff, and prayed judgment. The note was endorsed to the plaintiff by the initials of his christian name. The defendants demurred to the petition, and assigned as a cause of objection that there was no averment in the petition that the plaintiff was the same person to whom the note purported to be assigned. The demurrer was sustained by the court and judgment rendered for defendants. The Practice Act allows a demurrer for several causes, but in every instance they must be apparent on the face of the petition. When they do not so appear, the objection must be taken by answer.

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The petition in this case was good and in the usual form, and no objection was urged against it in a manner known to the law. The demurrer might more properly be denominated a demurrer to the assignment than to the petition, which is a form of pleading our law-makers have not seen fit to provide for. The note filed constituted no part of the petition, and cannot be referred to or considered on demurrer, in determining the sufficiency of the pleadings. In Curry v. Lackey, 35 Mo. 392, Dryden, J., said, "a demurrer to a petition confesses the truth of all the allegations of the petition which are well pleaded, but denies the legal conclusions the plaintiff would derive from them. In determining the sufficiency of the petition in such cases, the averments contained in it can alone be considered; nothing beyond can be looked to."

The court erred in sustaining the demurrer, and its judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

BENJAMIN E. HARRIS, Respondent, *v.* THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

Practice — Pleading — Variance — Judgment.—A party cannot declare upon one cause of action, and recover judgment upon another and a different cause.

Appeal from Macon Circuit Court.

Carr, for appellant.

I. This suit is not based upon any statute to recover any penalty; it does not purport to be. It totally fails to show any cause of action under any statute. It is not alleged that appellant is even a corporation of this State. This it is necessary to do, in order to show a cause of action, where none existed at common law. (*Welton v. Pacific R.R.*, 34 Mo. 358; *Williams v. Hingham et al.*, 4 Pick. 341; R. C. 1855, § 53, p. 1239.) The first count is in the nature of the common-law action of trespass *de bonis asportatis*.

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II. The second count totally fails to state any causes of action. A party is never presumed to prove more than he alleges ; and if he fails to allege facts sufficient to constitute a cause of action, and a verdict and judgment are rendered on such defective allegation, such judgment will be reversed in the Supreme Court although there was no demurrer, or motion in arrest of judgment, filed. (R. C. 1855, § 10, p. 1231 ; Lynn v. St. bt. Indiana, 25 Mo. 235 ; 27 Mo. 169 ; 7 Barb. 581.)

Prewitt, for respondent.

WAGNER, Judge, delivered the opinion of the court.

Harris filed his petition in the Macon county Circuit Court against the appellant, claiming damages in the sum of two thousand dollars, for the loss of a negro slave named Isaac. The petition contained two counts ; the first stated that the appellant, without leave and wrongfully, took the slave and did not return the same ; the second count alleged that appellant, by failing to use ordinary care and diligence in the management of its railroad cars, caused respondent Harris to lose the said negro slave.

On the trial no evidence was introduced tending in anywise to sustain the allegation in the first count, and it was therefore considered as waived.

It will not be necessary to review all the testimony and examine all the instructions in detail given and refused by the court. The evidence, in substance, showed that the respondent, being in St. Louis, wrote to his wife at Macon to send to him his slave Isaac, and in pursuance of this instruction, Mrs. Harris wrote and delivered to the negro a pass, directed to the conductor of the appellant's road, requesting him to take charge of and pass the said slave to Hannibal, and deliver him to one of the boats of the Keokuk Packet Company, and not allow him (the slave) any liberties. The writing, or pass, was not produced at the trial, and secondary evidence was admitted as to its contents, against the objection of appellant's counsel.

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The slave made his escape, but whether before or after he reached Hannibal, does not appear.

The court, at the instance of the respondent, instructed the jury, that, 1. If they believed from the evidence the slave was put in the car of the defendant, with the letter of Mrs. Harris, and that it was shown to the conductor, it was his duty to take charge of him and endeavor to keep him safely; and if he neglected to do so while on the road, and the negro was lost, defendant was bound to pay plaintiff the damages sustained thereby, whether the negro was sent by plaintiff's authority or not.

2. If the jury believe from the evidence that defendant, through its agent, received on its cars the negro "Ike," and he was lost in consequence of the negligence of defendant's agents while acting as such, the plaintiff is entitled to recover.

3. It devolves on the defendant to show that the slave was carried to Hannibal, or that his loss on the road was not occasioned by any want of diligence on the part of the defendant's agents.

To the giving of each of the above instructions the appellant by its counsel objected, and excepted in due form. The jury found a verdict for the respondent, on which judgment was rendered by the court.

The instructions are predicated on the doctrine of a contract, and the responsibilities and duties of a bailee, or common carrier, are applied to the appellant. The allegation in the petition, on which a recovery is sought, is in the nature of a tort, if indeed it sets out any cause of action at all. The mere averment that a party, by failing to use ordinary care and diligence in the management of a railroad, causes plaintiff to lose certain property, is certainly not a sufficient statement of facts, within the meaning of the Practice Act. But had the subsequent proceedings in the suit, and the declarations of law, corresponded with the allegation, the judgment would perhaps be good, as no advantage was taken in the court below by demurrer. The statute permits a party

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to amend his petition after his evidence has been given, to make it conform to the proofs; but no such thing was attempted in this case. It then presents the singular spectacle of declaring for one cause of action, and obtaining judgment for another and different cause. It is not simply a question of variance, which will be disregarded when objections are not properly taken, but of the very essence, and goes to the foundation of the action. Such a course of procedure is destructive of all certainty in pleading, and can neither be tolerated nor encouraged.

The judgment will be reversed, and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

HAMILTON DEGRAW, Defendant in Error, *v.* GEORGE M. TAYLOR, Plaintiff in Error.

Limitations—Adverse Possession—Color of Title.—A party entering into possession of land without color of title, can only prescribe for the land in his actual occupancy; if he claim under a tax deed, his possession will be under color of title only from the date of the deed.

Error to Macon Circuit Court.

Gilstrap, for plaintiff in error.

Lander, for defendant in error.

I. The tax deed, read in evidence by Taylor, as the basis of his adverse possession, only related from the time of its date, 6th August, 1853, and not from the time of the sale recited therein (*Darrah v. Veal*, 19 Mo. 331). The suit being commenced 13th July, 1862, ten years did not elapse.

II. Taylor did not connect the possession with the color of title until 1855, when the evidence shows he purchased the possessory title and joined it to his tax title, up to which time the tax title and possession were adverse to each other.

Color of title and possession must go together to cover the entire tract. (33 Mo. 41; 34 Mo. 41; 30 Mo. 310; 27 Mo.

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601; 32 Mo. 553.) The ten years allowed for redemption from a tax sale cannot be computed in the period of limitation. (Pease v. Lawson, 33 Mo. 41.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiff brought his action of ejectment against the defendant in the Circuit Court of Macon county, on the 13th day of July, 1862, to recover the possession of a quarter section of land lying in said county, and showed title in himself, originating with a patent from the United States, dated May 28, 1819.

The defendant, showing no title, rested his defence upon the statute of limitations. The evidence tended to prove an open, visible, notorious and adverse possession on the part of the defendant, and those under whom he claimed, amounting to an actual occupation for more than ten years next before the commencement of the suit, of a part only of the land in controversy, not exceeding twenty acres, claiming the whole. There was no color of title otherwise than by a tax deed of the State Register, dated August 5, 1853, upon a tax sale made on the first Monday in October, 1850. The defendant endeavored to make this deed available for color of title as far back as the day of sale. It has already been decided by this court that a possession, taken under a tax title of that kind, is not to be considered as adverse to that of the owner, prior to the date of the tax deed. (Pease v. Lawson, 33 Mo. 35.) We see no good reason for departing from that decision.

The defendant then stands on a naked adverse possession, without shadow of title. It is too well settled to need discussion, that, as against the legal seizin which accompanies the true title, the possession of a stranger to the title, or a mere intruder, in order to be adverse in the sense of the law, must be an open, visible, notorious, hostile, and actual occupation. It is sometimes difficult to determine what acts of possession amount to proof of such actual occupation; but, in this case, while the proof is clear of an adverse possession to the extent of twenty acres, there is no evidence whatever

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of any acts of possession beyond that extent. The verdict was for the plaintiff for the whole tract, excepting the twenty acres so adversely occupied for more than ten years. We find no error in the instructions on either side; they were in accordance with the views here taken of the law of the case.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

JOHN DONOHOE, Respondent; *v.* GEORGE MCALLEER, Appellant.

Practice—Action for Personal Property.—It is no bar to the plaintiff's right of action to recover possession of personal property delivered to him upon giving bond, &c., and damages for the detention thereof, that the plaintiff has sold and transferred the property since it was delivered to him under the process of the court.

Appeal from Buchanan County Common Pleas Court.

Townsend, for appellant.

Woodson & Jones, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding under the statute for the claim and delivery of personal property.

On plaintiff making affidavit and giving bond as prescribed by law, the sheriff of Buchanan county seized the property and delivered to him the possession. Defendant in his answer denied that plaintiff was entitled to the possession of the property; and for further defence averred, that, after the commencement of the suit, he sold and transferred the property to another person, and that therefore he had no right or interest in the same, and was not entitled to recover.

Plaintiff, by a witness on the trial, proved his title to the property and its value, and that he demanded the same previous to the institution of the suit. Defendant then proved that after the commencement of the suit, but before the trial, the plaintiff had transferred and sold the property to another person. This was all the evidence in the case.

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The court, on motion of plaintiff, instructed the jury, in substance, that if they believed from the evidence, that, at the commencement of the suit, the property mentioned in plaintiff's petition was the property of plaintiff and was then in the possession of the defendant, and he refused to deliver it up when demanded by plaintiff, they should then find for the plaintiff and assess his damages at one cent.

The court refused to instruct the jury, at the instance of the defendant, that if the plaintiff had sold the property in controversy since the commencement of the suit, they must find for the defendant.

The jury returned a verdict for plaintiff for nominal damages, one cent, and the defendant appealed.

The instruction placed the law fairly before the jury, and the judgment is evidently for the right party. The defendant unlawfully detained the property, and the plaintiff resorted to proper legal means to obtain its possession. When he had so reduced it to possession, he had a right to exercise all acts of ownership over it, including its sale and transfer, without impairing any right in the prosecution of his action. Had he been defeated in his suit after he had parted with the property, the defendant would have been entitled to the full value. As it was, the plaintiff ought to have recovered damages for the illegal detention; and as he appears to have been satisfied with the modest sum of one cent, we do not think the defendant has any reason to complain.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

WILLIAM BLAIR, Appellant, v. JOHN CORBY, Respondent.

Contract—Evidence.—Where a contract for the grading of a railroad stipulated the price to be paid for the excavation and embankment of earth, including all materials except hard-pan, but fixed no prices for other kinds of excavation, upon a suit to recover the value of work done in excavating indurated earth, the plaintiff may show by evidence that the words "earth excavation" did not include indurated earth, for the purpose of showing that the price to be paid for such excavation was not fixed by the contract.

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Appeal from Buchanan Court of Common Pleas.

Vories & Vories, for appellant.

If language is used which has a technical or local or provincial meaning which is not understood by the court, or when words have a particular meaning when used in connection with a particular kind of transaction, the court should admit parol evidence to apply or explain the particular words used. (1 Greenl. Ev. § 280 and notes, and § 292 *et seq.*) And where, also, circumstances and facts arise during the execution of a contract, which were not within the contemplation of either party, then either party, by parol, may show the fact that said circumstances or things were outside of the contract, and in order to do so, may show the particular meaning and effect of the words or phrases used in the contract. (Dubois v. Delaw. & Hud. Canal Co., 12 Wend. 334; Shepard v. St. Charles West. P. R. Co., 28 Mo. 373, and cases cited; Reed v. Hobbs, 2 Seam. 297.)

The defendant pointed out no objection to the evidence, so that the court might see upon what ground the objection was taken, wherefore this court will presume that the court below ought to have admitted the evidence, as it might, for aught that appears, be material, or the plaintiff might have made it material, if the objection had been defined. (Clark v. Conway, 23 Mo. 437; 32 Mo. 311; 33 Mo. 349; 12 Mo. 280.)

Points and authorities for respondent:

I. The items of grubbing and clearing excavation of foundation, wasted and indurated earth, in exhibit "A." of Hunt's deposition, were properly excluded by the court. (Shepard v. St. Charles West. P. R. Co., 28 Mo. 373; Boyle v. Agaw. Canal Co., 22 Pick. 384.)

II. A portion of the excluded evidence is objectionable, as being offered to control and vary a written contract, by parol evidence. (22 Pick. 384; 1 Greenl. Ev. § 275; 2 Sumn. 569.) Another portion of the excluded evidence is objectionable, as being offered to sustain issues that were not

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made in the pleadings; and still another portion of the excluded evidence is objectionable, as being offered to show a modification of the written contract by parol evidence, when the written contract itself provides that no such modification should be made unless the same is reduced to writing.

III. The language of the contract is plain, and its terms cannot be contradicted by any evidence of custom inconsistent with its terms. (3 Kent's Com. 359, *n. f.*, 10th ed.; 2 Sumn. 569.)

IV. There was no such decision of the court in this case as precluded plaintiff from a recovery. The Supreme Court will not therefore interfere. (Layton v. Riney, 33 Mo. 87; 33 Mo. 375-6).

HOLMES, Judge, delivered the opinion of the court.

The petition is based upon a written contract for the building of a portion of the western division of the Hannibal and St. Joseph Railroad, and the plaintiff claims to recover of the defendant a balance of fifteen hundred dollars for what he alleges to be due for extra work done under said contract, but over and above what was therein specially provided for. The plaintiff had contracted to construct and complete the clearing, grubbing, grading and masonry, and to furnish all requisite materials for the completion of the work, according to the specifications annexed, and he was to receive, in full compensation therefor, certain fixed prices for the kinds of work specified, among which were for embankment or for excavation, twenty cents per cubic yard; and in the specifications, excavation was divided into five classes: first, earth excavation, including all materials except "hard-pan," and quicksand, and rock; second, "hard-pan;" third, quicksand; fourth, loose rock; and fifth, solid rock; but no fixed prices were named in the contract for any of these divisions but for "excavation."

It was stipulated in the contract that the determination of the measurements and calculations of the engineer of the

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respective quantities and classifications of such excavation, should be final and conclusive. Another provision was, that when rock, or "hard-pan," was placed in embankments, and had been paid for as such, the price of embankment should be deducted therefrom; that is, it was not to be paid for both as excavation and embankment, but the excess of the price of excavating such material, only, was to be paid for. The plaintiff sought to recover for several items, as extra work, which, it was conceded, were not embraced within the terms of the written contract, and also for the following items, which are the main subjects of dispute in the case, namely: chopping and clearing, at sixteen stations, indurated earth, and excavation of foundations wasted.

The answer denied all the material allegations of the petition, and averred, by way of defence, that the plaintiff had been fully paid the whole amount due him, and that the matters in issue had been adjudicated on a former trial, in another suit.

The contract was read in evidence by the plaintiff in support of his petition, and he offered to prove (among other things) in substance, that it was expressly agreed, in making the contract, that it should only apply to ordinary earth or excavation, and not to indurated earth; that the terms used in the contract, concerning embankment and excavations, were intended and understood to mean common earth excavation; that, after it was discovered that there was indurated earth to be excavated, there was an agreement entered into between the parties as to the amount to be paid for excavating such indurated earth, and the terms of the agreement, and the prices of different kinds of excavation; and that, at the time of making the contract, it was understood by the parties that there was no excavation but that of common earth to be done on that part of the road which was embraced within the contract; that the word "excavation," as used in contracts among railroad men, is understood to mean common earth, and not indurated earth; that at the time of the contract it was not contemplated by the parties

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that there was any indurated earth on that part of the road which was embraced within the contract ; and that after indurated earth was discovered within that portion of the road, the defendant paid the plaintiff an extra price for such excavation, and agreed to pay *extra* for such work. All this evidence was excluded. Some depositions were also excluded, but the foregoing is supposed to cover the points to be decided.

These rulings all related to the item of indurated earth. The question of a former adjudication of the same matters does not arise upon this record. The matter to be determined is, whether this evidence was admissible upon this petition, and the contract stated therein. The first inquiry must be as to whether or not the items in dispute were embraced within the terms of the contract. It is plain that the whole excavation, to whichever of the five classes it belonged, was intended to be covered by the contract. It is equally clear that the first class, earth excavations, was intended to include all materials to be removed, except hardpan, quicksand, and rock, loose or solid ; and all the five classes of excavations are unquestionably embraced within the contract. And it may be taken as settled, that, for all work done under the contract, the plaintiff must sue upon the contract—can only recover under it, and in accordance with its terms so far as they go, and that he cannot recover for such work, as extra work, wholly independent of the contract. He was bound by his contract to do all the work therein specified, and according to the specifications, and for the prices fixed by the contract, so far as they were fixed. (Shepard v. St. Charles West. P. R., 28 Mo. 373.) The essential question here is, whether the price of indurated earth was fixed by the contract. The contract names a price for embankment or excavation only, and excavation is defined by the specifications to be of five sorts ; and the first is earth excavation, which is to include all materials except what are embraced within the other four classes ; and the determination of the engineers as to the classification of such excava-

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tion, and the quantity of each class, is to be final and conclusive. It is not said that he shall determine the prices of the respective kinds; but it is sufficiently manifest, on the face of the instrument, that it was not contemplated that the same price should be accepted and paid for solid rock as for common earth excavations. It was said, in the case above cited, that the most obvious and natural sense of the words "earth excavations," was that they meant ordinary earth, and that although excavations in general might include all materials found beneath the surface of the ground, yet that the expression "excavation of earth" would exclude other materials than ordinary earth, such as "indurated earth, or gravel." Here there is an express exclusion of "hard-pan," quicksand and rock. "Hard-pan" seems to be a term well understood among railroad men; it is not an uncommon word among geologists; and it is sufficiently understood in common speech to designate something different either from common earth or rock, not to be included in either of them; and it cannot well mean anything else, in a contract of this kind, than some intermediate kind of hard material, such as compact, indurated or cemented earth, sand, gravel or conglomerate, which could not be dug with a spade or shovel; in short, that "hard-pan" and indurated earth or gravel mean the same thing. Such would seem to have been the conclusion of the Supreme Court of Ohio, in Mansf. & San. R.R. Co. v. Veeder (17 Ohio, 385), after a thorough discussion of the subject, where, as in this case, it was agreed in the contract that the estimate of the engineer, as to the quantity and kind of work, should be conclusive upon the parties, and the engineer had estimated what should properly be called "hard-pan" or common earth. The court held that he had mistaken the true meaning and intent of the contract. The question was of a material so hard as to cost about forty cents per cubic yard, when the contract price for ordinary excavation was nine cents; it was held to be "hard-pan," and the court granted relief against the estimate of the engineer, under the contract, on the ground of mistake.

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Whatever doubt there may be as to the meaning of the term on the face of the instrument, there can be no question that extrinsic and parol evidence was admissible to interpret and explain the meaning of the words among railroad men, and as understood by the parties ; and if it were shown that the material in question came within the meaning of the words as used in the contract, by whatever other name it might also be called, it would follow that the price of this kind of excavation was not fixed by the terms of this contract. In a suit upon the contract, the value of this kind of work would remain to be ascertained by evidence tending to show what it was actually worth. (*Shepard v. St. Charles West. P. R. Co.*, 28 Mo. 373.) The work was embraced in the contract, but the price was not fixed. Where the kind of work is not included at all within the terms of the contract, but it is done as extra work altogether, the plaintiff may recover upon a *quantum meruit*. (*Dubois v. Del. & Hud. Can. Co.*, 12 Wend. 334.)

It was insisted on the part of the defendant that the judgment should be affirmed, on the ground that the plaintiff had no occasion to suffer a non-suit, inasmuch as he might have been entitled to recover upon other items of his demand ; but the items in question were a substantial part of what he claimed ; and we do not understand the former decisions of this court as going beyond the case, where the plaintiff may still be entitled in law to recover his whole demand, notwithstanding the rulings of the court against him.

On the case as it stood, we think the evidence offered by the plaintiff was erroneously excluded.

Judgment reversed and cause remanded. Judge Wagner concurs ; Judge Lovelace absent.

Humphreys v. Lundy.

MARTIN HUMPHREYS, Defendant in Error, *v.* GABRIEL LUNDY,
Plaintiff in Error.

1. *Justices' Courts—Judgments—Limitations.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16.)
2. *Justices' Courts—Judgment—Scire Facias.*—A *scire facias* under the provisions of the statute (R. C. 1855, p. 951, §§ 7-9), to revive a justice's judgment, may issue after a lapse of ten years. The provisions of the act relating to judgments, (R. C. 1855, p. 902,) apply only to judgments of courts of record.
3. *Practice—Judgment—Scire Facias.*—A *scire facias* to revive a judgment is not a suit upon the judgment, in which the plaintiff recovers the amount of the original judgment, with interest and costs. The proper entry, is to award execution for the amount of the original judgment, with interest from its rendition, and costs.

Error to Macon Circuit Court.

Hall & Oliver, for plaintiff in error.

I. The court improperly refused to give the third and fourth declarations of law asked by defendant. (R. C 1845, pp. 716-17; R. C. 1855, p. 1048; Acts 1856-7, pp. 77-8.)

II. This is a suit in fact for a debt founded on a liability other than a judgment of a court of record, and is governed by the statute of limitations of 1845. The act of 1855 concerning justices' courts does not apply. (Dash *v.* Vankleeck, 7 Johns. 494; Perkins *v.* Perkins, 7 Conn. 563.)

Carr, for defendant in error.

The only point in this case is, whether a judgment rendered by a justice of the peace is barred by any period of limitation, and if so, when and by what statute.

It is a general principle in the construction of a statute, that when it makes an innovation upon the common law, it must be strictly construed. (16 Johns. 7; 4 Binn. 116; 5 Denio, 119; 1 Barb., S. C., 65; 3 Kelly, 31; 4 Mass. 471; 15 Mass. 205; 9 Pick. 496; 13 id. 284; 3 Stew. & Por. 13; 2 Humph. 320.) A statute of limitations is an innovation upon the principles of the common law, and hence must be

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strictly construed, inasmuch as it deprives a party of a just right.

A judgment rendered by a justice of the peace may be enforced by issuing execution thereon at any time within three years after its rendition; but not after that period, unless such judgment shall have been revived in the manner prescribed. (R. C. 1855, p. 951, §§ 7-10.) There is no limitation in the chapter relating to the establishment of justices' courts, upon the right of revival thus conferred upon the plaintiff, whose judgment has not been paid off or satisfied. And the only defence which the defendant is authorized or allowed to make, when cited before the justice to show cause why the judgment shall not be revived, and an execution issued thereon is, "*that the judgment has been paid or satisfied.*" (Id. § 10.)

Now, here is a full, complete, and adequate remedy furnished by the act itself, without any extraneous aid being invoked from any other statute. And the right of revival thus conferred, is nowhere taken away by any statute, by express terms, or even by any fair implication. The plaintiff in error invoked the aid of the statute of limitations (R. C. p. 1048, § 3,) by quoting these words: "*Obligations or liability.*" Now, these words do not apply to a judgment of a justice of the peace. The revival of a judgment is not a "*civil action,*" and hence it is not embraced in said section.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff recovered a judgment before a justice of the peace in the county of Macon, on the 24th day of July, 1848, for the sum of \$175.21. Nearly fifteen years afterwards, an affidavit for a *scire facias* to revive the judgment was filed with the successor of the justice who rendered the judgment. A *scire facias* was issued, and upon the answer of the defendant, a trial was had, on an issue of payment, before a jury, and there was a verdict and judgment for the plaintiff for \$458.36, debt and damages. On appeal to the Circuit Court of Macon county, another trial was had, at the March

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term, 1864, and a verdict rendered for the plaintiff, and judgment given for \$283.64, debt and damages, the same to bear interest at six per cent. It does not appear by the record that the statute of limitations was set up as a defence on either trial; but on the last trial, the defendant asked the court to instruct the jury, among other things, "that a justice's judgment is a judgment, in the meaning of the act entitled 'An act regulating judgments and decrees,' approved December 1, 1855, and if the judgment of the justice, sought to be revived by this suit, has been rendered ten or more years before the commencement thereof, the plaintiff cannot recover a revival of his judgment." The act referred to in this instruction concerns only judgments and decrees of courts of record, which are a lien upon real estate, and it gives a remedy by *scire facias*, to revive a judgment and lien, within ten years from the rendition of the judgment. Judgments of justices' courts are not a lien upon real estate, and it is evident that they were not intended to be included within the provisions of that act. This proceeding appears to have been instituted under the act concerning "Justices' Courts." (R. C. 1855, p. 951, §§ 7-9.) This act contains no limitation on the time when a *scire facias* may be issued to revive a judgment in a justice's court. By the analogy of the statute of limitations, such judgment might be presumed to be paid after the lapse of twenty years. The defendant insists upon the act concerning limitations of civil actions as furnishing a bar. It provides that "Civil actions can only be commenced within the periods prescribed in the sections which follow, after the causes of action shall have accrued." (R. C. 1855, p. 1047, § 1.) It provides a limitation of five years upon "an action upon a contract, obligation or liability, express or implied," (except those mentioned in another section), "and except upon judgments or decrees of a court of record, and except where a different time is limited in this act." Judgments of courts not of record are not included within the exception, nor are they included within the purview of the act at all, unless a *scire facias* is to be considered as a civil ac-

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tion. It has been held that a *scire facias* is a suit, within the statute providing that "every suit" shall be continued at the return term of the writ (Milsap v. Wildman, 5 Mo. 425), and also that the limitations in actions (R. C. 1845, Art. 1-3) did not, by any necessary implication from the provision contained in the act concerning a presumption of payment after the lapse of twenty years, apply to actions of debt on judgments (foreign or domestic) of courts of record. (Manning v. Hogan, 26 Mo. 570.) If this proceeding had been an action of debt on the judgment in another court, it might have fallen within the same exception. A clear distinction is made in the books between an action and a *scire facias*. Mr. Chitty, treating of debt on judgments, speaks of "the remedy by *scire facias*" as also frequently adopted, on which damages are not recoverable for detaining a debt, and therefore he considers it more judicious to proceed by action upon a recognizance of bail, than by *scire facias*, which is "only a continuation of a former suit, and not an original proceeding." (1 Chit. Pl. 127, 299; McGill v. Perigo, 9 J. R. 259.) It is not the commencement of an action to which the statute of limitations can be pleaded. (Brown v. Byrd, 5 Eng., Ark., 533; Evans v. White, 7 Eng., Ark., 33.) The judgment of a justice's court, though not a court of record, is the end and consummation of the action, and conclusive evidence of the debt, which is merged in the judgment, and nothing remains but to have execution thereof; and the general rule is that the statute of limitations is not pleadable to a liability founded on a *judgment of court*. (Ang. Lim. § 82; Pease v. Howard, 14 J. R. 479.) We find nothing in the statutes of this State which changes the rule with regard to the judgments of justices' courts. This judgment, then, was not barred by any statute of limitation. (Randolph v. Randolph, 3 Rand. 490; Gee v. Hamilton, 6 Mumf. 32.)

But the courts below appear to have proceeded as if the proceeding had been an action of debt on the judgment; and instead of merely reviving the former judgment and issuing a new execution thereon for the amount of the original

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judgment, together with the interest accrued and costs, as they were authorized to do by the ninth section of the act, (R. C. 1855, p. 951,) they proceeded to a trial anew, and gave judgment for debt and damages, upon the verdict of the jury, not reviving the former judgment at all, but giving a wholly new judgment.

In this their action was clearly erroneous, and for this reason the judgment must be reversed, and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.

JAMES W. CURRY, Appellant, *v.* THOMAS H. COLLINS, Respondent.

Slander — Pleading. — When the slanderous words used do not of themselves impute to the plaintiff the commission of a crime or offence involving moral turpitude, or some infamous punishment, the petition must contain an averment of the extrinsic matter necessary to show that the words are actionable. The words "he is a bushwhacker" are not actionable *per se*. Where the ground of complaint is that the plaintiff has been injured in his character, reputation, or business, the action cannot be maintained without an averment that the words were spoken of the plaintiff in reference thereto, and the words become actionable by reason of some special damage which must be averred and proved as laid.

Appeal from Worth Circuit Court.

The petition was as follows:

"Plaintiff states that on the 6th day of June, A. D. 1865, at the county of Worth aforesaid, the defendant, in the presence and hearing of divers citizens of said county, maliciously spoke of and concerning plaintiff the following false and slanderous words, that is to say: 'I (meaning the defendant) was yesterday insulted by a bushwhacker, and James W. Curry (meaning plaintiff) was the man.' 'A bushwhacker insulted me (meaning defendant), and Curry (meaning plaintiff) was the man.' 'I (meaning defendant) was insulted by James Curry (meaning plaintiff), a bushwhacker.' 'James W. Curry (meaning plaintiff) is a bush-

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whacker.' 'I (meaning defendant) was insulted by a bushwhacker, and James W. Curry (meaning plaintiff) is the man.' 'A bushwhacker insulted me (meaning defendant) yesterday, and James W. Curry (meaning plaintiff) is the man.' Defendant thereby then and there intending to charge, and did charge plaintiff, to the understanding of the said citizens then and there hearing the said words as aforesaid, of being a bushwhacker, and of being an enemy to his government and country, and of being guilty of the crimes of murder and robbery. Wherefore plaintiff says, that, by the speaking of said false and slanderous words by defendant, he is damaged to the amount of five thousand dollars, and for which he asks judgment."

To this petition a demurrer was sustained.

Richardson, for appellant.

Dixon and Vories & Vories, for respondent.

I. The petition contains no averment, except that the defendant, on the 6th day of June, 1865, called plaintiff a "bushwhacker." As the true meaning of the term cannot *per se* impute a crime, inuendoes cannot enlarge its meaning so as to make it actionable. An inuendo cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain. (*Vanvechten v. Hopkins*, 5 Johns. 220; *McClaagry v. Wetmore*, 6 Johns. 83; *Thomas v. Crasswell*, 7 Johns. 271.)

Again, if the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous or equivocal; and require explanation by reference to some extrinsic matter to show that they are actionable, it must be expressly shown that such matter existed, and that the slander related thereto. (*Chit. Pl.*, 10 Am. ed., 400; 8 East. 431; 9 East. 93; 13 East. 554; 2 Pick. 320; 15 Wend. 327.)

To call a person a "bushwhacker," or to say he is a "bushwhacker," is not slanderous, and therefore not actionable, without an averment or colloquium that the term was synon-

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ymous, and was so understood to be, with murderer, robber, traitor, or the perpetrator of some other infamous crime. Such averment or colloquium is matter of proof upon the trial, while an inuendo is nothing but a mere explanation of the colloquium and slanderous words as understood by the plaintiff. (Niven v. Munn, 13 Johns. 48; Hopkins v. Beedle, 1 Caines, 347; Ward v. Clark, 2 Johns. 10; Chapman v. Smith, 13 Johns. 68; Crookshank v. Gray, 20 Johns. 344; Adams v. Hannon, 3 Mo. 160; Dyer v. Morris, 4 Mo. 214; Palmer v. Hunter, 8 Mo. 512.)

As the plaintiff does not demand special damages, he relies upon the words being actionable in themselves. Words cannot be actionable in themselves unless they imply guilt of some offence for which the plaintiff might be punished by the criminal courts, or that he has a disease that renders him unfit for society. (2 Bouv. Law Dict. 528; 1 Hill. on Torts, 401; 1 Stark. on Sland. 390.)

II. The petition is manifestly defective in this, to-wit:— As an inuendo cannot enlarge or change the meaning of the words, and is not an averment, but the mere opinion of the plaintiff as to the meaning of words, the petition ought to contain an averment that the words were spoken by the defendant *with the intent* to charge a particular crime. See Andrews v. Woodman, 15 Wend. 232, and 1 Stark. Sland. 390, n., where the Court say—"So, where, from the ambiguity of the terms used in reference to the offence charged, the words have a covert meaning, to render the declaration good, it must be averred that they were spoken *with the intent* to charge a particular crime, the difficulty cannot be obviated by an inuendo."

The words, "you are a bogus pedler," without any averment showing the meaning of the term, are not actionable. (Seney's Ohio, Code 166.)

As the term "bnshwhacking" is used in our Constitution, it will not bear the construction given to it by plaintiff's inuendo, for it defines bushwhacking as a "description of marauding."

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The rule is, that words imputing a charge which, if true, would subject the party charged to indictment for a crime involving moral turpitude, or subject him to an infamous punishment, are actionable in themselves. If they fall short of this test, they are not actionable merely as imputing an offence, but special damages must be shown. (*Brooker v. Coffin*, 5 Johns. 188.) And this is the rule re-asserted in *Widing v. Oyer*, 13 Johns. 124; *Martin v. Stillwell*, id. 275; *Burch v. Nickerson*, 17 Johns.; *Case v. Buckley*, 15 Wend. 327; *Bissell v. Cornell*, 24 Wend. 354; *Young v. Miller*, 3 Hill, 21; *Chase v. Whitlock*, id. 139; *Crawford v. Wilson*, 4 Barb. 504; *Pike v. Van Wormer*, 5 How. 171.

HOLMES, Judge, delivered the opinion of the court.

This was an action of slander. There was judgment upon demurrer for the defendant. The substance of the petition was, that the defendant, in the presence and hearing of divers citizens, maliciously spoke of and concerning the plaintiff the following false and slanderous words, that is to say, "I (meaning the defendant) was yesterday insulted by a *bushwhacker*, and James W. Curry (meaning the plaintiff) was the man"; and the same is repeated in various forms, the amount of the whole being that the defendant called the defendant a *bushwhacker*; thereby intending to charge the plaintiff, to the understanding of said citizens, with being a bushwhacker and an enemy to his government and country, and with being guilty of the crimes of robbery and murder; and damages are claimed to the amount of five thousand dollars. The ground of the demurrer was that the petition did not state facts sufficient to constitute a cause of action. The specified objection relied upon seems to be that the words are not in themselves actionable, and that there should have been some averments, by way of inducement, for the purpose of showing that the word "*bushwhacker*" was used in a sense that would impute to the plaintiff some indictable offence involving moral turpitude, or some infamous corporal punishment.

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Since the statute, (R. C. 1855, p. 1240, § 55) there need be no colloquium of extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff, more than that the words were spoken of and concerning him. (*Stieber v. Wensel*, 19 Mo. 513.) And when the slanderous words are actionable in themselves, it is not necessary to make any prefatory averments as to the circumstances to which they refer; but if the words do not, *per se*, convey the meaning which the plaintiff would assign to them, the petition must contain a statement of the extrinsic matter necessary to show that they are actionable, and what is necessary to be stated must be proved. (*McManus v. Jackson*, 28 Mo. 56.) As to what words are in themselves actionable, the general rule would seem to be, that the charge contained in them must be such that, if true, it would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment; (*Brooker v. Coffin*, 5 Johns. 191; *Martin v. Stillwell*, 13 id. 275;) but as many offences are indictable as misdemeanors, not necessarily involving moral turpitude or any infamous punishment, it has been held that the rule that is most safe and certain in its application is, that words are in themselves actionable which impute an indictable offence for which corporal punishment may be inflicted. (*Birch v. Benton*, 26 Mo. 153.) The term *bushwhacker*, as an old English word, would not of itself import anything of a criminal nature; much less would it imply any particular indictable offence known to our law. But of late the word has come to have a special application and a particular signification in popular use, at least within this State. Since the date of this petition, it has found its way into the Constitution of the State (Art. II., § 3), where it seems to have been used as equivalent to "that description of marauding commonly known as *bushwhacking*." A marauder is defined in the law to be "one who, while employed in the army as a soldier, commits larceny or robbery in the neighborhood of the camp, or while wandering away from the army" (2 Bouv. Law Dict. 133);

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but in the modern and metaphorical sense of the word, as now sometimes used in common speech, it seems to be applied to a class of persons who are not a part of any regular army, and are not answerable to any military discipline, but who are mere lawless banditti, engaged in plundering, robbery, murder, and all conceivable crimes. But we cannot say that the word has yet received any such fixed, definite, and generally received sense, in the popular mind, much less in any critical use of the language, that it can be declared as a matter of law, by its own force, to convey a direct imputation of any specific indictable offence.

Where the words are not in themselves actionable, they can only be made so by such averments, in relation to extrinsic matters, as will show that the defendant imputed to the plaintiff a criminal offence. In such cases the extrinsic facts, in reference to which the words spoken become actionable, are usually first averred, and then the *colloquium* that the words spoken related to those facts, and were spoken concerning the plaintiff; and lastly, by proper *inuendoes*, the application of the word is made to the previous averments; and it is not enough merely to add a statement, that the defendant thereby intended to impute a crime, as if one should say "he never signed the note," and it should be averred that he thereby meant to impute the offence of forgery. (Andrews v. Woodman, 15 Wend. 232; Dyer v. Morris, 4 Mo. 214.)

The pleader may have been induced to forego the making of any such averments by the consideration that he might not be able to prove them. In the concluding part of the petition it is alleged that the defendant, by the use of that word, intended to charge him with being a bushwhacker—an enemy to his government and country, a robber, and a murderer. The plaintiff does not appear to have considered himself charged with any specific indictable offence, but rather with belonging to a class of persons, of whom it was a descriptive characteristic to be guilty of all sorts of crimes, and so, that he was himself a person of very bad character and reputation.

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But when the words are not in themselves actionable, and cannot be made so by any prefatory inducement, whereby they can be made to impute an indictable offence which is punishable by a corporal punishment, and the ground of the complaint is, that the plaintiff has been injured in respect to his character and reputation, his trade and business, or his profession or occupation merely, the action cannot be maintained without an averment that the words were spoken of the plaintiff in reference to some one of these things, and then the words become actionable only by reason of some special damage, which must be particularly averred and proved as laid. There were no averments of this kind in this petition, and for this reason also it must be held to be bad on demurrer.

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

JAMES W. CURRY, Appellant, *v.* JOSEPH CABLISS, ISAAC PHILIPS, AND JAMES BURNETT, Respondents.

Practice—Pleading—Elections.—A petition in a suit against the judges of an election precinct for wrongfully refusing the plaintiff's vote, must set out the facts which give the plaintiff a cause of action, and show how he was entitled to vote, by stating the qualifications which gave him the right.

Error to Worth Circuit Court.

This case was heard at the September term, 1865, of the Worth Circuit Court, and the demurrer to the following petition sustained :

" Plaintiff by his petition states that the defendants were the judges of the election held on the 6th day of June, 1865, in the county of Worth and State of Missouri, for the purpose of taking a vote on the proposed Constitution of the State of Missouri, adopted by the Convention of said State on the 8th day of April, 1865, and acting as such at the

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precinct at the town of Oxford, in Green township, in said county of Worth; that on said day, plaintiff being in all respects a legal voter of said county, and entitled to vote at said election, having fully complied with the law respecting voters previous to offering his vote or ballot, appeared at said precinct and delivered his vote or ballot to the defendants, as such judges of election, which was by them received and deposited in the ballot-box. Plaintiff further states, that afterwards, to-wit, on the said sixth day of June, 1865, the defendants, as such judges as aforesaid, illegally, wilfully, maliciously and corruptly threw out the vote or ballot so given by plaintiff at said election, and refused to count the same with the other votes or ballots given and deposited on said day at said election, but destroyed the same. Wherefore plaintiff states that by reason of the said illegal, corrupt and malicious acts of defendants, as such judges, in depriving plaintiff of his right to have his said vote counted, and in throwing out and destroying the same, he is damaged to the amount of fifteen thousand dollars, and for which he brings his suit."

Richardson et al., for appellant.

I. The court erred in sustaining the demurrer to appellant's petition, for the petition is sufficient and states facts sufficient to constitute a cause of action. (*Ashby v. White et al.*, 1 Smith's Lea. Cas. 290; *Broom's Leg. Max.* 101-2; *Sedg. on Dam.* 29-31; *Jenkins v. Waldron*, 11 Johns. 114; *Lincoln v. Hapgood*, 11 Mass. 350; *Osgood v. Bradley*, 7 Greenl. 411; *Tozer v. Child*, 40 Eng. L. & Eq. 89; 9 Ohio, N. S., 568.)

II. And the defendants are as much liable for throwing out and refusing to count plaintiff's vote, as they would be for refusing to receive the same; for then they, as judges, were acting outside of, and beyond, their authority. (*Laws of 1863*, p. 17; *Kelley v. Bemis*, 4 Gray, Mass. 83; *People v. Pease*, 30 Barb. 588; *Sullivan v. Jones*, 2 Gray, 570; *Craig v. Burnett*, 32 Ala. 728.)

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Dixon & Murray, for respondents.

I. The court below committed no error in sustaining the demurrer, as the petition is manifestly defective on several grounds. The petition contains sweeping averments of conclusions of law, but few statements of fact. If the plaintiff was legally qualified to vote at said precinct, facts in reference to the manner of his qualification ought to be stated, not conclusions of law. (R. C. 1855, p. 1227, § 3; Beech v. Gallup, 2 N. Y. Code, 66; Parker v. Totten, 10 N. Y. Pr. 234; Voorhies' N. Y. Code, 169; Biddle v. Boyce, 13 Mo. 532; Smith et al. v. Dean, 19 Mo. 63; Pye v. Rutter, 7 Mo. 548; Jones v. Brinker, 20 Mo. 87.)

We hold that the petition, in order to make a cause of action against the defendants, ought to aver that plaintiff convinced or satisfied defendants of his right to vote, and aver the fact that he took the oath of loyalty before said judges. Anything short of this is insufficient. Facts must be stated, and not conclusions of law. When plaintiff avers that he was a legal voter, he states a conclusion of law, which is insufficient. (Adams v. Holley, 12 How. 326; Thomas v. Desmond, 12 How. 321; Myers v. Machado, 14 How. 149; Reeltas v. Myers, E. D. Smith, 83; Tallman v. Green, 3 Sand. 438; Stone v. DePuga, 4 Sand. 681.; Garvey v. Fowler, 4 Sand. 665; Boyce v. Brown, 7 Barb. 80; Van Schaick v. Winne, 16 Barb. 95; Murdock v. Chenango Mut. In. Co., 2 Comst. 216; Seney's Ohio Code, 102 & 104; How. N. Y. Code, 192.) This rule of law is too well established in this State, N. York, and other States, to need further comment.

II. Again, as we understand the law, we hold that as soon as the plaintiff's ballot was deposited in the ballot-box it became public property, and that plaintiff had no more control over it than any other citizen of the State. We take it to be a well settled principle of law, that when the whole community are injured by the unlawful acts of others, no one individual among those injured can sustain an action unless he avers and proves special damages, and not always then.

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The plaintiff must aver that he proved to the judge his right to vote before he can maintain an action for the rejection of the same in the count ; we refer specially to the case of *Blanchard v. Stearns*, 5 Metc. 298. In that case the court say, that "it must be shown that the plaintiff furnished the defendants with sufficient evidence of being a voter, and requested them to insert his name on the list, before they refused to receive his vote or omitted to insert his name. (1 Hill. Torts, 85.)

The leading case on this subject is *Ashby v. White et al.*, reported in 1 Smith's Lea. Cas. 290. In that case the plaintiff avers that he was a "burgess," and an inhabitant of the borough of Aylesbury, when the election was held ; that, being such burgess and inhabitant, he had a right to vote, &c.

Curry, the plaintiff in this case, merely alleges that he was qualified as a voter of Worth county, but not that he was a qualified voter of the precinct at Oxford, in the township of Green. We hold that he ought to allege in his petition the place of his residence ; and if a non-resident of Green township, who administered the oaths required by the Constitution, including the oath of loyalty, for such oaths would be legally void if administered by any other person than the judges of said election.

If defendants tampered with the ballot-box and destroyed legal votes, the 38th section of the election law, Stat. 703, provides the punishment, not only of the judges, but of the clerks also, which is a fine of two hundred dollars, to be recovered by civil action, in the name of the county, or by indictment, in either case the fine to go into the county treasury.

HOLMES, Judge, delivered the opinion of the court.

The questions to be considered here are only such as arise upon demurrer to plaintiff's petition. The chief objection was that the petition did not state the facts necessary to be shown in order to constitute the plaintiff a qualified and legal voter, and only conclusions of law. The petition did not

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aver any of the particular facts on which his right to vote depended. It recited only that the plaintiff "being in all respects a legal voter of said county, and entitled to vote at said election, having fully complied with the law respecting voters previous to offering his vote or ballot," appeared before the judges and delivered his vote, which was received and deposited in the ballot-box, and afterwards thrown out.

The constitution, ordinances, and statutes of the State, define the qualifications of voters at this election, and the several provisions on the subject show that facts must exist with regard to any person claiming a right to vote in the State, before he can be entitled to vote at any election. The evidence of these facts must be produced or the facts shown to the judges of the election, in the manner provided by law, and the judges are to be satisfied that the person offering to vote is a legal voter. (Laws of 1863, p. 17, § 4.) The cause of action here is founded on the right to vote, and the action is maintainable where that right has been wilfully, or maliciously, or wrongfully denied by the judges of election, on the ground that wherever there is a right, there is a remedy. But all the facts necessary to constitute that right must be stated in the petition, in order that the court may see, that as a matter of law, the right exists. It cannot be allowed to the party to judge, both for himself and the court, what facts shall be sufficient in law to entitle him to vote at any given election; nor to draw the conclusions of law for himself in his petition.

It is a familiar rule of pleading that the plaintiff must state in his petition all the facts, specifically, which would be necessary, if true, to entitle him to maintain his action, or to have the relief which he seeks. (Biddle v. Boyce, 13 Mo. 532.) And when the right to vote depends upon qualifications prescribed by statute, and it is provided that the judges shall be answerable only in certain specified cases, the plaintiff must state specifically all the facts necessary to bring his case within the statute; he must aver, not only in general terms, that he was a legal voter, but the facts which constitute him such

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legal voter. (*Blanchard v. Stearns*, 5 Metc. 298.) It was also held in this case that the plaintiff must not only allege and prove the facts which made him a legal voter, but also that he furnished the judges of election with sufficient evidence of his having the legal qualifications of a voter, and requested them to receive his vote, before his vote was refused; and he cannot be entitled to recover without showing that he produced, or was ready to give, such evidence of his right as ought to have been received as satisfactory by the judges. In the case of *Ashby v. White* (2 Ld. Raym. 738), 1 Smith's Lea. Cas. 290, the declaration alleged that the plaintiff was a burgess and an inhabitant of the borough of Aylesbury, and not receiving alms there or elsewhere, but "was duly qualified and entitled to give his vote for the choosing of two burgesses for the borough aforesaid"; and Ch. Justice Holt said that the right of representation in the Commons of England was "exercised in these different qualities, either as knights of shires, citizens of cities, or burgesses of burroughs"; and the right of election belonged to them as freeholders of the counties, and was "incident to, and inseparable from, the freehold." It would, then, appear that when the plaintiff averred that he was a burgess of the burough, not receiving alms, he but stated facts from which it could be seen that he was legally entitled to vote in that burough. In *Pryce v. Belcher*, 3 C. B. 58; 1 Smith's Lea. Cas., n. 309, the plaintiff was registered as a voter for the burough of Abingdon, but in consequence of becoming a non-resident he had lost his right to vote there, and it was held that he could not maintain an action against the judges of election for refusing to receive his vote. Here the plaintiff makes no averment of the constitutional qualification, that he was a free white male citizen of the United States; nor that he had attained to the age of twenty-one years; nor that he had resided in this State one year before the election, the last three months whereof were in the county or district in which he offered his vote; nor that he offered a ballot having written thereon the words "New Constitution—yes," or the words

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"New Constitution—*no*" (Art. XIII., § 3, of the Const.); nor (if he were then absent from his place of residence) that he had offered any evidence to satisfy the judges that he was a qualified voter, or that he offered to be sworn by them that he had not voted in said election at any other election precinct (id. § 5); nor that he had taken, or offered to take, "*the oath of loyalty*," to be administered by the judges of election to every voter, as required by the Constitution (ib. § 6). He merely avers that he had "fully complied with the law respecting voters previous to offering his vote." That averment is a mere conclusion of law drawn by himself, and not a statement of facts from which the court might draw the conclusion, that, as a matter of law, he was a qualified voter, and had a legal right to vote. He does not allege the facts necessary to show that he was a legal voter of the county, but only that he was "in all respects a legal voter of said county;" which again is merely a conclusion of law, and not a statement of facts.

The complaint is, that the judges illegally, wilfully, maliciously, and corruptly threw out his vote after it had been received and deposited in the ballot-box, and refused to count the same with the other votes, and destroyed the same. The facts are not stated in such manner as to enable us to say, whether the transaction amounted to anything more or other than a mere refusal to receive and count his vote. Nor, if it distinctly appeared that the vote had been received, the name of the voter entered in the poll-books, the poll-books signed by the judges, and the ballot-box opened, and the votes counted and strung on a string, and sealed up in a package, and delivered to the clerk of the county court for safe keeping, as required by the statute (Laws of 1863, p. 17), or that any fraud had been practised on the ballot-box at any stage of the proceedings, would it be necessary now to decide in what manner the judges, or the person so offending, would be held responsible, or to whom liable in damages, or otherwise. The gravamen of the complaint here seems to be, the refusal of the judges to receive and count the plain-

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tiff's vote; and, for the reasons already stated, we are of the opinion that the petition does not state facts sufficient to constitute a cause of action, and that the demurrer was well taken.

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

ASHBY PETERS, Respondent, *v.* GEORGE F. CLAUSE, Appellant.

Bailment—Damages.—The owner of a slave may recover damages of a bailee, for an injury done to the slave by an inhuman and cruel beating, in consequence of which the slave returned to his master before the time for which he had been hired had expired.

Appeal from Clay Circuit Court.

Hall & Oliver and Merriman, for appellant.

HOLMES, Judge, delivered the opinion of the court.

The only questions presented for review here are those arising upon the instructions. The instructions which were refused for the defendant proceeded upon the ground mainly, that if the injured slave had been hired out to defendant by the year, under a written contract of bailment, and had been injured by inhuman and cruel beating while so hired, the plaintiff could not recover any damages on the cause of action stated in the petition. The court instructed the jury for the plaintiff, to the effect, that if the plaintiff was the owner of the slave Thomas, and the defendant had bruised and injured him while in his possession, under a hiring from the plaintiff, he had a right to recover damages for the injury done to the slave, beyond what was necessary for purposes of correcting and controlling him.

We see no material error in this instruction for the plaintiff. The evidence showed that the slave was injured, and the plaintiff damaged in respect of his property in him, beyond any authority given, or any usage warranted by the

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contract of hiring. The slave found refuge with his master. The defendant never claimed to have him returned. The contract was violated and broken, and the plaintiff had a right to treat it as ended by the fault of the defendant. He is not suing for the wages of the whole time mentioned in the contract, but for the actual damage done to the slave, when the hiring was so terminated. The case may be considered as standing in the same situation as if the time of the hiring had expired, and the slave had been returned in an injured condition. If a horse be returned in a damaged condition by the mere negligence of the lirer, the bailor will be entitled to recover damages, (*Logan v. Mathews*, 6 Penn. 417 ; 2 Pars. Contr. 125,) and much more, when the property has been injured by wilful and inhuman misconduct. (*Sto. Bail.* §§ 399, 400, 413.)

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant,
v. JEREMIAH P. MOORE, Respondent.

1. *Practice—Trial—Evidence—Exceptions.*—Evidence should be admitted or rejected when offered, and the bill of exceptions should show that the objections were made when the evidence was offered, with the specific reasons therefor.
2. *Railroads—Public Lands.*—The acts of Congress of June 10, 1852, and February 9, 1853, and the act of the General Assembly of September 20, 1852, amounted to a legislative grant of the even numbered sections of land within six miles of the roads named in said acts, as soon as the lands were designated by a definite location of the route of said railroads in the manner provided in said acts. It was not necessary that the maps, showing the definite location of the roads, should designate the particular sections which had been granted by the acts. The descriptive list of lands granted by the acts of Congress, certified by the Commissioner of the General Land Office, is presumptive evidence that the lands therein specified have been granted.

Appeal from Linn Circuit Court.

Hall and Oliver, for appellant.

I. The court improperly excluded the proofs offered by

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plaintiff. (10 U. S. Statutes at Large, 8; Greenl. Ev. §§ 484-5.)

II. It made at least a *prima facie* case of title in fee to the land in suit. (Acts of 1857, Adj. Sess., 54.)

III. The statute of limitations did not commence running against plaintiff until the selection of land was affirmed by the Secretary of the Interior. (Lindsey et als. v. Lessee of Miller, 6 Pet. 666.)

Lander, for respondent.

I. The company by the record have shown no title to the land in question, excepting that furnished by the record of the descriptive list, under the act of the Legislature Nov. 23, 1857.

The grants of land to the company attached to no particular part until the land was selected. (32 Mo. 21.) No evidence in the record shows that that land was ever selected.

II. There was no power in the Legislature to pass such a law, until it was first shown that the land in question passed out of the United States. (13 Pet. 517.)

HOLMES, Judge, delivered the opinion of the court.

This was an action in ejectment, commenced on the 30th day of July, 1863, in the Linn county Circuit Court, for the recovery of the possession of a tract of land, described as the southeast quarter of section 10, in township No. 58 north of the base line, and range No. 20 west of the fifth principal meridian, situated in the county of Linn, in the State of Missouri. The answer denied that the plaintiff was entitled to the possession of the premises. It admitted that the defendant had entered and taken possession of the premises, as alleged, but claimed that he had done so by virtue of a good and sufficient legal title in himself; and the statute of limitations was set up as a defence. The plaintiff claimed title under the act of Congress of June 10, 1852, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the con-

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struction of certain railroads in said State" (10 U. S. Stat. at Large, p. 8); and an act of the General Assembly of the State of Missouri, entitled "An act to accept a grant of land," &c., approved September 20, 1852 (R.R. Laws, 115); and offered in evidence, *First*—A certified copy of a resolution of the board of directors of the Hannibal and St. Joseph Railroad Company, adopted on the ninth day of March, 1853, accepting the grant of lands mentioned in said act, from the office of the Secretary of State, where it had been filed on the 17th day of March, 1853; to the admission of which no objection was made.

Second—A certified copy of the map of the definite location and route of the Hannibal and St. Joseph Railroad, with lines and figures on the same denoting the sections, townships and ranges within six miles of the railroad, from the office of the Commissioner of the General Land Office, by which it appeared that the location of the route was made and adopted by the company on the 8th day of March, 1853; but it did not show the date when the same was filed in the office of the Commissioner of the General Land Office at Washington; and it was admitted by the defendant that the land sued for was situated within six miles of the railroad, as located on the map, but there was nothing on the face of the map to indicate that this particular quarter section had been granted, nor were the sections numbered on the map. This document was excluded as "improper evidence."

Third—A certified copy of a similar map, from the office of the Recorder of Linn county, which appeared to have been filed for record on the 16th day of March, 1854; but the copy was not certified by the Recorder to be a copy of the record in his office; and it was excluded on the ground that it was not recorded, no objection being specifically taken to the want of a certificate of the Recorder. It was admitted that the land sued for lies within six miles of the railroad as indicated on the map; but there was nothing on the face of the map to indicate that the land in question had been granted to the plaintiff.

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Fourth—A descriptive list of lands situated in Linn county, granted to the plaintiff by the State of Missouri, by the act of September 20, 1852, as the same had been certified by the Commissioner of the General Land Office, and approved by the Secretary of the Interior, and filed for record in the Recorder's office of the county of Linn, in compliance with the act of the General Assembly of Missouri, approved November 23, 1857, and recorded January 12, 1858 ; to the admission of which there was no other objection than that set forth in the defendant's motion, to exclude all the plaintiff's evidence, at the close of the evidence. Some evidence was then offered by the defendant relating to his possession of the land in controversy ; and at the close of the case, on motion of the defendant, the court excluded all the plaintiff's evidence. The plaintiff thereupon took a non-suit with leave, filed his motion for a new trial, and took an appeal to this court.

The action of the court below, in sustaining this motion, was clearly erroneous. There was certainly some admissible and competent evidence before the jury, and some of the plaintiff's evidence had been admitted without objection. Evidence should be admitted or excluded when it is offered on the trial, and the bill of exceptions should show that the objections were made when the evidence was offered, and the specific ground of the objection should be stated at the time; otherwise the objections will be presumed to have been waived. When evidence has been admitted, with or without objection, it is proper for the court to give instructions upon the legal effect of such evidence ; and if no sufficient evidence is introduced to warrant the jury in finding a verdict for the plaintiff, the court may instruct the jury to find for the defendant, unless the plaintiff will take a non-suit.

The act of Congress and the act of the General Assembly amounted to a legislative grant, which operated as a grant of the specific lands, whenever they should be particularly ascertained and designated by a definite location of the route of the railroad. This location was to be made by the corpo-

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ration. When that was done, the act operated as a grant of the alternate sections of land lying within six miles of the railroad on either side, and bearing even numbers on the surveys of the public lands, unless the same had been previously sold by the United States, or some right of pre-emption had been acquired. The admissions of the defendant in his answer, and on the trial, are sufficient to identify the land sued for, as a part of one of the sections which had been so granted. A certified copy of the public surveys of lands would be the proper evidence to show what sections had been surveyed and designated by even numbers within the six miles of the railroad, as located by the company. To the admission of the certified copy of the definite location of the railroad no valid objection was specifically made. It was not necessary that the map accompanying it should designate on its face the particular sections which had been granted. The same may be said of the certified copy which was produced from the office of the Recorder of Linn county. No objection was made to the admission of the descriptive list. It appears to have been made out and filed in accordance with the act of the General Assembly. (R.R. Laws, 113.) It was admissible evidence to show a *prima facie* title in the plaintiff to the lands therein designated, under the act of Congress making the grant; but it was only *prima facie* evidence, and could not impair or affect the right or title of any individual to any of these lands, when such right or title should be made to appear; and it was open to rebuttal. We think the court erred in excluding the plaintiff's evidence at the close of the trial.

The judgment is reversed and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.

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THE STATE OF MISSOURI, Respondent, *v.* JAMES L. BURNSIDE, Appellant.

1. *Practice—New Trial.*—The Supreme Court will not reverse a judgment because the verdict is against the weight of evidence; but when there is no evidence, or the verdict is wholly unsupported by evidence, it will interfere and grant a new trial.
2. *Criminal Practice—Jurors.*—Jurors must be impartial and wholly unprejudiced. Where a juror upon his *voir dire* has sworn that he had never formed or expressed an opinion as to the guilt or innocence of the prisoner, and after verdict of guilty, the defendant moved for a new trial, for the reason that the juror had before the trial declared that he believed the prisoner to be guilty, which fact the defendant only learned after verdict, and filing affidavit of respectable witnesses testifying to such expression of opinion on the part of the juror, the court should set aside the verdict and grant a new trial.
3. *Witness—Competency.*—Where defendants jointly indicted are severally tried, the wife of the defendant not on trial is a competent witness for the co-defendant, except in cases of conspiracy and other joint offences.

Appeal from Livingston Circuit Court.

Hall, Oliver and Dixon, for appellant.

The court erred in refusing to set aside the verdict and grant a new trial, because one of the jury had, prior to the trial, expressed the opinion that appellant was guilty of the crime charged against him, and that he should be punished therefor, and upon his *voir dire* swore that he made no such expression; and because the verdict of the jury was glaringly against the evidence in the cause, and manifestly against the law. (*Busick v. The State*, 19 Ohio, 199, *et seq.*; 2 *Gra. & Water. N. Tr.* 399, &c.; 22 *Me.* 198.)

The court erred in refusing to permit Mrs. Ella Barnes, a witness offered by appellant, to testify in the cause. She was a competent witness for appellant on his separate trial, although she was the wife of James Barnes, who was appellant's co-defendant in the indictment. (*Whart. Am. Crim. Law*, 295; 2 *Russ. Crimes*, 696, & note; 1 *Greenl. Ev.* § 335; 1 *Mass.* 15; 1 *Gray*, 555; 1 *Phil. Ev.* 75, & note; 2 *Stark. Ev.*, 3 *Am. ed.* 707-8, note 1; *ib.* 412, note 2.)

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Asper, for respondent.

I. To reverse a conviction because a verdict is against evidence, it must be where the weight of evidence not only preponderates, but greatly and glaringly preponderates. The rule is well settled in this State. (Hartt v. Leavenworth, 11 Mo. 629; McKnight v. Wells, 1 Mo. 13; Campbell v. Hood, 6 Mo. 218; Lackey v. Lane, 7 Mo. 220; McLean v. Bragg, 30 Mo. 262; Irving v. Riddlesburger, 29 Mo. 340.) There must be no evidence. (Heyneman v. Garneau, 33 Mo. 565; Weber v. Degenhardt, 24 Mo. 458; Morris v. Barnes, 34 Mo. 412.)

II. The court did not err in refusing to admit Mrs. Ella Barnes to testify. She was the wife of James Barnes, a co-defendant, indicted with defendant, not convicted nor in any way released. The statute on evidence leaves the question as at common law. (R. C. 1855, p. 1578.) At common law the wife of an accomplice or co-defendant is not admissible any more than the husband. (1 Water. Arch. Crim. Law, 496; Whar. Cr. L. 294; Rose. Crim. Ev. 113, & authorities.) In this country the cases conflict somewhat, but the weight of authority is that such evidence is inadmissible. (Note 1, Water. Arch. Crim. L. 16, 496; 10 Pick. 57.) In this State the rule was unsettled for several years. In Garrett v. The State, 6 Mo. 1, the court held that an accomplice was a witness, whether discharged or convicted; and if this was still the law, the wife certainly would be a witness. But this rule was doubted in the case of McMullen v. The State, 13 Mo. 30; and in the case of Roberts v. The State, 15 Mo. 59, it was settled that the accomplice was not a witness. This has been held to be the law up to this time. In this latter case, the court has referred approvingly to two cases, one English and the other American, where it was held that the wife of a co-defendant not on trial could not be admitted as a witness for the other co-defendant, on trial. This seems to give the weight of authority of the Supreme Court of this State to the exclusion of such a witness.

Rex v. Locker, 5 Esp. 107; State v. Smith, 2 Ired. 405;

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Pullen v. People, 1 Doug., Mich. 48; Com. v. Garland, 1 Mass. 15; were all cases where the wife was held incompetent. Two of these cases are quoted with approval by our court, in 15 Mo. 59.

The case of People v. Bill, 10 Johns. 95; Com. v. Robinson, 1 Gray, Mass.; the case of Com. v. Barton, 10 Pick. 57, and in the case of Roberts v. State, 15 Mo. 59, it has been settled beyond a peradventure that the wife of an accomplice is an incompetent witness for a co-defendant. This is on the ground of public policy, which principle applies to the wife with force of equal strength as to the co-defendant. It is said in Greenleaf that the wife of a joint trespasser is not a competent witness for a co-defendant, even if the husband has been proven guilty of the charge. (1 Greenl. § 335; People v. Williams, 19 Wend. 377.)

III. The court did not err in refusing the new trial on the question of fact made in the motion, as to the expression of an opinion by a juror, John Austin.

It is alleged that on a certain day three boys heard Austin say in his shop that these men, Barnes and Burnside, were guilty, and should be punished. Austin denied, on his trial as a juror, that he had ever expressed an opinion as to the guilt or innocence of defendant. He so says in an affidavit, and his partner says he was with him all the time, and never heard him express an opinion as to their guilt or innocence. Austin is sustained by half a dozen of his neighbors, citizens of the town, as to his character for honesty, and for truth and veracity. (Whart. Crim. L. 654, & note 1, old edition; ib. 655, note t.; Conwell v. Anderson, 2 Ind. 122; 5 U. S. Dig. 434, ¶¶ 112, 115, 119; 12 U. S. Dig. 446-7, ¶¶ 34-5; Lisle v. The State, 6 Mo. 426; Com. v. Flanegan, 7 Watts & Serg. 415.) A mere casual expression of opinion formed from rumor, or a partial statement of the case, is not a sufficient cause of challenge or new trial. (Lisle v. State, 6 Mo. 426; Baldwin v. State, 12 Mo. 224; State v. Rose, 32 Mo. 354; 7 Watts & Serg. 415.)

The question of corruption in the juror is one to be sub-

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mitted to the discretion and decision of the judge who tried the cause, upon all the facts in the case—the evidence of the juror, and affidavits to sustain and impeach him. (State v. Ross, 29 Mo. 51; Whart. Crim. Law, 655, note 1.)

The affidavit of a juror is received to sustain a verdict, but never to impeach it. (Dana v. Tucker, 4 Johns. 487; Lisle v. State, 6 Mo. 428; State v. Ross, 29 Mo. 51; Whart. 655, & note.)

WAGNER, Judge, delivered the opinion of the court.

The appellant and one James Barnes were jointly indicted in the Circuit Court of Livingston county, for the crime of robbery. Defendants severed on the trial, and at the November term, 1865, of the Circuit Court for said county, appellant was separately tried, convicted, and sentenced to the penitentiary for ten years. After making a motion for a new trial, and also in arrest of judgment, both of which were overruled, he appealed to this court.

The first ground that is insisted on for a reversal is, that the court erred in not setting aside the verdict, because it was against the evidence in the cause. Where there is no evidence, or where the verdict is wholly unsupported by evidence, this court will interfere and grant a new trial, in furtherance of the ends of justice; but where it is simply a preponderance, or a question as to the weight of evidence, this court has invariably abstained from all interference.

The jury are, from the very nature of things, the rightful and legitimate triers of the facts, and from their peculiar organization they are the most competent to determine the proper credibility which is to be attached to the witnesses, and to weigh their evidence and find accordingly. It must therefore be a case glaring and palpable, which would induce us to interfere and disturb their finding. In examining the evidence, as preserved in the bill of exceptions, we cannot say that this is such a case. There is most obviously not a total want of testimony, for there are circumstances, which, if taken together, go very far to support the verdict.

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And it would be impossible to review this testimony, and give it its proper weight and credit, without knowing something of the character of the witnesses, hearing them detail it, and being conversant with any bias or influence which may have operated on them. No error is perceived in the ruling of the court, in refusing to set aside the verdict for this reason.

The next ground assigned for a new trial is, that one of the jurors who served on the trial had prejudged the case; that the answers given by him, when the usual questions were propounded, as to whether he had formed or expressed an opinion, were not true; and that this disqualification was not known to the appellant till after the trial and verdict in this cause. To support this ground the affidavits of three persons were filed, stating that, before the trial, they heard the juror declare that he believed Barnes and the appellant were guilty, and that they ought to be punished. The counter affidavit of the juror was filed, denying that he ever made any such statement, and, in addition thereto, the affidavit of others, deposing to his character for veracity, and affirming that he was worthy of belief on oath. Another witness, who works in the shop with him, swore that he was in the shop with him on the day when the declaration of the juror concerning the guilt of the accused was alleged to have been made, and that he heard him make use of no such statement. It is to be here observed that the affidavits of the witnesses, ascribing the statement to the juror, are direct and positive, and cannot be overcome by the negative testimony by which they were sought to be counteracted. No effort was made to impeach their character for veracity, and hence we must take their affidavits to be true. True, the expression may have escaped the juror's mind, and it is not necessary to impute moral turpitude to him; but he was legally disqualified, and the appellant had the high and sacred constitutional privilege of being tried by men who were impartial, and who had never, at any time, prejudged his cause. Public policy dictates that the administration of public justice should

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not only be free from reproach, but also from the least suspicion of reproach. Whilst the community have an abiding confidence in its fairness, its purity, and integrity, they will cheerfully submit and acquiesce in its decisions. They will approach its altars with the firm conviction that their persons and property will be protected, and their rights vindicated. But let an imputation of unfairness or partiality be thrown upon it, and its dignity is impaired, public respect is diminished, and its influence is gone.

Jurors should be wholly unexceptionable, and the usual test to judge of their fitness and competency is on their examination, on their *voir dire*; but if they do not answer truly, and fail to disclose their disabilities, the prisoner is not to be deprived of his rights when he subsequently discovers the objection.

On the trial the appellant offered to introduce as a witness in his behalf Mrs. Barnes, the wife of James Barnes, who was his co-defendant, and indicted jointly with him for the commission of the robbery. This evidence was objected to on the part of the State; the objection was sustained by the court, and the evidence excluded. This question has never before been presented to this court, and we have therefore no direct adjudication upon it. Since the case of the State v. Roberts, (15 Mo. 28,) the law has been considered as settled in this State, that where two persons are jointly indicted, neither is admissible as a witness for his co-defendant; and this is the rule whether they are tried jointly or separately. It was there declared that public policy, not interest, furnished the rule of exclusion. The question involved here was considered and discussed by Judge Ryland in that case, but as it was not presented by the merits, or necessary to be decided there, no opinion was arrived at.

In Michigan it has been held that if the co-defendant is incompetent, his wife—or, if the wife be indicted, the husband—would also be incompetent. (Pullen v. The People, 1 Doug., Mich. 48.)

The question was decided in the same way in New York,

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in *The People v. Bill*, (10 Johns. 95,) and this principle is approved in 1 Cow. & Hill's Notes to Phillips' Ev. 72, where the learned authors seem to approve the doctrine, that when one defendant is not a competent witness for his co-defendant, when they sever in the trial, it is a necessary inference that the wife of such defendant is equally incompetent. There are other respectable authorities to the same point. But Professor Greenleaf says that "the wife is not a competent witness against any co-defendant, tried with her husband, if the testimony concerns the husband, though it be not directly given against him. Nor is she a witness for a co-defendant, if her testimony, as in the case of a conspiracy, would tend directly to her husband's acquittal ; nor where, as in the case of an assault, the interests of all the defendants are inseparable ; nor in any suit in which the rights of her husband, though not a party, would be concluded by any verdict therein ; nor may she, in a suit between others, testify to any matter for which, if true, her husband may be indicted. Yet when the grounds of defence are several and distinct, and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another." (1 Greenl. Ev. § 335.) And Wharton approvingly quotes the last paragraph of the above section, and adds, "Where the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one defendant, where the trials are separate, is a witness for the other." (Whart. Crim. L. 295, 2d ed.)

It has been uniformly held that the wife of one of several defendants, accused of a crime alleged to have been jointly committed, is an incompetent witness for any of his associates when all of them are on trial. (Com. v. Manson, 2 Ashm. 31; Rex v. Fredrick, 2 Stran. 1095; Regina v. Denslow, 2 Cox, C. C. 230; Com. v. Robinson, 1 Gray, 555; The State v. Burlingham, 15 Me. 104.)

But it is established by a series of well considered decisions, and such seems to be the decided weight of authority, that where several are jointly indicted for an offence which

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may be committed by one or more, and they are tried separately, the wife of one defendant is a competent witness for the others; and on separate trials, they are entitled to the benefit of her testimony in all cases, except conspiracy or other joint offences. (Com. v. Manson, *supra*; The State v. Moffit, 2 Humph. 99: The State v. Worthing, 31 Me. 62; The State v. Anthony, 1 McCord, 286; Regina v. Allen, 1 Crawf. & Dix., C. C., 104.)

Upon the principles and analogies of law which govern in the rules for the production and admissibility of testimony, we are of the opinion that the evidence should be received. Upon the separate trial of the co-defendant, except in conspiracy and such like joint offences, the judgment in the case of the prisoner will neither enure to the benefit or to the injury of the husband, and therefore the rule of law precluding the wife from testifying either for or against her husband is not infringed.

Several other grounds have been insisted on by the counsel for the appellant, in opposition to the ruling of the court below, but we see no other errors in the record.

For the refusal of the court to grant a new trial, in consequence of the disqualification of the juror, and excluding the testimony of Mrs. Barnes, the judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

JAMES J. MINOR *et als.*, Appellants, v. JOHN H. CARDWELL *et als.*, Respondents.

Conflict of Laws—Husband and Wife—Domicil.—Personal property is governed by the law of the domicil of the owner, and the law changes with the change of domicil. Where a wife, living in Kentucky with her husband, owned slaves, which, by the law of that State, were taken to be held as real estate, and were not subject to attachment or levy under execution for any debts of the husband, yet upon the removal of the parties to this State, bringing the slaves with them, the rights of the husband over the slaves will be determined by the laws of this State.

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Appeal from Daviess Circuit Court.

H. M. & A. H. Vories and S. A. Richardson, for appellants.

The statutes of Kentucky, relied on by the plaintiffs, and which were read in evidence, were only intended to cause the slaves of a married woman, owned by her at the time of her marriage, or which came to her by gift, devise, &c., during coverture, to be held and taken to be real estate for certain specific purposes ; that is, "that no slave shall be liable to the debts of her husband, or be attached, levied on, or sold for his debts," &c. It was not intended that the wife should hold the property as separate property, no title vesting in the husband, but merely that the property should not be sold for his debts, and was therefore only an exemption law, and could have no extra-territorial force or effect. Hence, when the slaves were brought to Missouri, they were subject to and governed by the laws of Missouri, and were only exempt from levy and sale for the husband's debts contracted before the marriage, or before the wife came into the possession of the slaves. (*Johnson et al. v. Jones*, 12 B. Mon. 326; *Cox v. Coleman's Adm'r*, 13 id. 451; 9 id. 500.)

The laws of Kentucky clearly recognize a life estate in the husband in the slaves of the wife. This estate is only exempted from levy and sale during the life of the wife. This is clearly an exemption of an acknowledged property in the husband from sale, for and during the life of his wife. This exemption certainly could have no force in Missouri ; therefore such life estate might be sold for the husband's debts contracted after the marriage, and after said slaves came to their possession.

It is admitted that the law of the place where a marriage takes place governs the right or title to property coming to the possession of the parties while residing there, and that whatever title is acquired at said place cannot be divested by the parties changing their domicil. But there is a marked difference between a right or the title to property, and the exemption of property from execution for certain pur-

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poses. (Sto. Confl. Laws, § 571; Smith v. Healey, 4 Conn. 49; Woodbridge v. Wright, 3 Conn. 523; Smith v. Spinola, 2 Johns. 196; Sicard v. Whale, 11 Johns. 194.)

If the laws of Kentucky fix the character of the property, and the rights thereto, and are not merely laws of exemption, then the slaves in question must be considered as real property in this State, as they are in Kentucky; and it is well settled, that as to real property, the rule as to the law of the domicil does not apply, but that such property is governed by the law of the place where it is situated. (Sto. Confl. Laws, § 436 *et seq.*, § 187 and note 3, §§ 167-8; Depas v. Mayo, 11 Mo. 314.)

With this view of the case, the husband's life estate could be sold to satisfy debts by him contracted after the negroes were reduced to possession. (R. C. 754; Cunningham v. Gray, 20 Mo. 170; Harvey v. Wickham, 23 Mo. 112; Barbee v. Wymer, 27 Mo. 140.)

The rule as to the law of the domicil does not prevail wherever the right asserted by said law is prohibited by the law of the place where it is to be enforced, or where it is against the policy of, or indirectly repudiated by, the laws of the place where it is to be enforced. (Sto. Confl. Laws, §§ 174-5, *et seq.*)

The statute of Missouri does directly repudiate the law of Kentucky, in declaring that slaves shall be personal property, and, in fixing their course of descent, inconsistent with the provisions of said law.

If the slaves in question were not the separate property of the wife, by virtue of the law read in evidence, an interest therein vested in the husband upon the marriage. If so, it was subject to sale by our laws for his debts. (Sallee v. Chandler, 26 Mo. 124.)

To ascertain whether the law of Kentucky makes the slaves the separate property of the wife, we should take the decisions and interpretation given to said law by the courts of Kentucky, by which it will be seen that the property is vested in the husband, subject to the provisions of said law, and

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was not separate property belonging to the wife. (Charlotte v. Chouteau, 25 Mo. 465; Johnson & w. v. Jones, 12 B. Mon. 326.)

WAGNER, Judge, delivered the opinion of the court.

The decision of this case rests on one single point. By the statute of Kentucky, of 1845-6, entitled "An act to further protect the rights of married women," it was provided that the slave or slaves of a married woman should, after the passage of the act in that commonwealth, be held and taken to be real estate, in so far that no slave or slaves, or the increase thereof, which such married woman should have at the time of her marriage, or which should come, descend, or be devised to her during her coverture, should be liable for the debts of the husband, or be attached, levied on and sold for his debts or liabilities of any sort or kind, nor should the husband's life estate in the slaves of the wife, the wife living, be levied on and sold to pay such debts and liabilities.

By our law, slaves were personal property, and slaves belonging to the wife became the absolute property of the husband, and were liable to be levied on and sold under execution, in like manner as other personal property, for his debts. The question is, whether slaves which were held by a married woman in Kentucky, under the operation of the law of 1845-6, and which were invested with the character of real estate by local law, and exempt from levy and sale for the husband's debts, are to be considered as held in the same manner, and with like conditions and exemptions, when brought by their owner to this State? In other words, after they are transferred to our jurisdiction by the voluntary act of the owner, is their status to be determined by the laws of Kentucky or Missouri?

It may be stated as a general rule, that laws have no force by their own proper vigor beyond the Territory or State by which they are made; excepting, for some purposes, the high seas or lands over which no State claims jurisdiction. Beyond or outside of this limit they can claim no sanction;

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obedience cannot be compelled, nor disobedience punished. Mr. Justice Story lays down the doctrine, that the laws of every State affect, and bind directly, all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural-born subjects or aliens; and also all contracts made, and acts done within it. (Sto. Confl. Laws, § 18.) No State can, by its own laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others. This is a natural and necessary consequence of the foregoing proposition; for it would be wholly incompatible with the independent equality and exclusiveness of the sovereignty of nations, that any one nation should be at liberty to regulate either persons or things not within its own territory; and hence it follows, as a necessary corollary, that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. (Sto. § 23.)

But, by the universal practice of civilized countries, by the comity of nations, the laws of one will be recognized and executed in another, where the rights of individuals are concerned. It is so with cases of contracts made in foreign countries; and courts of justice always expound and execute them according to the laws of the place in which they were made, provided they do not contravene the express municipal regulations, or are not repugnant to the policy of their own country. (Bank of Augusta v. Earle, 13 Pet. 519, 589, Taney, C. J.)

This comity is the purely voluntary act of the nation or State, and is totally inadmissible when contrary to its policy, or prejudicial to its interests. In Olivier v. Townes (14 Mart. 93-102), a contest arose in regard to the sale and transfer of a ship by a resident of Virginia, the ship at the time of the sale being locally in New Orleans; and before there was any delivery, she was attached by the creditors of the vendor.

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By the laws of Virginia, where the vendor lived and the sale took place, no delivery was necessary to complete the sale; but by the laws of Louisiana, where the ship, the subject matter of the contract, was locally situated, the sale was invalid unless accompanied with delivery. It was therefore a case of conflict of rights between the creditor and the purchaser. It was contended that, by the laws of all civilized countries, the alienation of movable property must be determined according to the laws, rules and regulations in force where the owner's domicil is situated.. But Porter, Judge, in an opinion of great learning and ability, combatted the position, and declared that where there was a clash or conflict in such a case, the comity must give way, and the laws of the place where the property may be must prevail. He concludes: "However anxious we may be to extend courtesy and afford protection to the people of other countries, who may come themselves or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of. It would be giving the foreign purchaser an advantage which the resident has not; and that, frequently, at the expense of the latter. This, in the language of the law, we think would be a great inconvenience to the citizens of the State, and therefore we cannot sanction it."

A testator, having his domicil in the State of Mississippi, died possessed of slaves there, and directed in his will that if either of his two sons, to whom he bequeathed his property, should die "without a lawful heir," his part, real and personal, should go to the survivor. Each son received his portion, and one removed with his slaves into Louisiana, and died "without a lawful heir." It was determined that, although by the law of the testator's domicil, the survivor might have had a title to such slaves, yet, as by the law of Louisiana testamentary substitutions were prohibited, the survivor's claim could not be enforced in the latter State. (Harper v. Stanbrough, 2 La. 377 ; Harper v. Lee, id. 382.) And in Mahorner v. Howe (9 Sm. & M. 247), a person

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domiciled in Virginia, by his last will and testament, made and executed in that State, directed that certain of his slaves, then being in Mississippi, should be emancipated and sent to Africa. By the law of Virginia, such a disposition was valid; by the law of Mississippi it was not. The courts of the latter State held the will void and inoperative as to the slaves in that State, because it contravened the public policy of the State, as declared by an express statute, and was not embraced in the general rule of comity regulating the law of the domicil.

The principle is so well established that it will hardly be questioned by any one, that personal or movable property is governed by the law of the domicil of the owner, wherever it may be situated, and this law of course changes with his change of domicil. To say that the slaves were real estate here, is to import the law of Kentucky into this State, and make it operate *ex proprio vigore* in opposition to the well settled rules of our own law. The case does not come within the meaning of the terms or the principles where the *lex loci contractus* governs. It is an attempt to bring property within our jurisdiction, and hold it by virtue of a foreign law, in a manner and by a tenure different from what is recognized by our own rules and regulations.

It is competent for a State, by legislative enactment, to declare that carriages, or other personal property, shall be deemed to be of the nature of real estate, and so held, and shall be devised and descend in the same way. But if that property was brought from such State into our territory, would our courts be bound, or even warranted, in making a distinction between that and other property of a like kind, to the detriment of the interests of our citizens?

It is believed the comity of nations has never been carried to this extent. There is nothing to distinguish the law by which property in slaves was formerly owned in this country from that which was applicable to other property. Slaves being regarded by our law as merely personal property, as soon as they were brought here, they were remitted to that

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condition, without considering the nature or character of the laws by which they were held in the country whence they came.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

THE STATE, Respondent, *v.* JOHN VAN HOUTEN, Appellant.

1. *Criminal Practice—Indictment.*—An indictment which charges an offence in the language of the statute creating it, is good. An indictment charging a party with administering medicine to a pregnant woman to procure an abortion or miscarriage, need not specify the kind, quality, or quantity of the medicine.
2. *Criminal Practice—Demurrer.*—A demurrer, or motion to quash an indictment, must specify particularly the grounds of objection.

Appeal from Harrison Circuit Court.

J. C. Parker, Circuit Attorney, for appellant.

I. The first cause attempted to be set up by the defendant, as a cause of quashing the indictment, is not sufficient, for the reason it does not distinctly specify the grounds of objection to the indictment. (R. C. 1855, p. 1176, § 24.)

II. It is not necessary that an indictment for administering medicine to a pregnant woman, to procure an abortion, should specify or describe the kind, quality, or quantity of the medicine charged to have been administered. (Rex *v.* Phillips, 3 Camp. 73; State *v.* Vawter, 7 Blackf., Ind. 592.)

H. M. & A. H. Vories, for respondent.

I. The indictment failed to state either what kind of medicine was administered, or to state that the kind of medicine was to the grand jurors unknown, and which allegations should be made, or the indictment is bad. (2 Archb. Cr. Ev. 92–105; Lehman *v.* The People, 1 Comst. 383–4; People *v.* Jackson, 3 Hill. 72.)

II. It should have appeared, from the indictment, that the

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medicine used was either poisonous or noxious, and likely to procure the result intended, or else the indictment was bad.

III. The indictment should have negatived the fact that the medicine used was advised by a physician to be necessary, &c.

WAGNER, Judge, delivered the opinion of the court.

This was an indictment for administering medicine, to produce an abortion and miscarriage, &c. The indictment charges that the defendant unlawfully and wilfully did administer to one Elizabeth Robinson, a woman then and there being pregnant with a child, a large quantity of medicine, with intent thereby to procure abortion and the miscarriage of the said Elizabeth Robinson ; the administering of said medicine to the said Elizabeth Robinson not being then necessary to preserve the life of the said Elizabeth, &c.

On motion of the defendant, the court quashed the indictment, because it did not state facts sufficient to constitute any offence, and because it did not specify or describe the kind, quantity or quality of medicine alleged to have been used or administered.

The first cause assigned for quashing was too general, and really amounted to nothing. A motion to quash an indictment must distinctly specify the grounds of objection ; and unless it does so, it will be entirely disregarded. (R. C. 1855, p. 1176, § 24.)

The second objection is, that neither the kind, quantity or quality of the medicine used or administered is specified or described. The language of the statute is, that " every physician, or other person, who shall wilfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman," &c. An indictment is generally good that charges the offence in the words of the statute creating it. The question to be tried is, whether the

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prisoner administered any kind of medicine to the woman with intent to procure abortion or miscarriage. The law does not require any particular kind, quantity, or quality of medicine to be alleged; nor would it be necessary to prove such kind, quantity, or quality, on the trial.

Our statute is similar to the English act of 43d of George II., § 2, and also to the statute of the State of Indiana; and the courts of both have decided that the name of the medicine need not be stated, nor need it be described as noxious. (*Rex v. Phillips*, 3 Camp. 73; *State v. Vawter*, 7 Blackf. 592.)

The court erred in quashing the indictment, for the reasons set forth in the motion; and its judgment will be reversed and the cause remanded.

Judge Holmes concurs; Judge Lovelace absent.

JOHN W. SHOTWELL, Plaintiff, *v.* THE STATE OF MISSOURI,
Defendant.

Practice—Supreme Court.—Case stricken from the docket, the bill of exceptions not appearing from the transcript to have been signed by the judge, nor any appeal or writ of error taken.

Appeal from Ray Circuit Court.

HOLMES, Judge, delivered the opinion of the court.

It appears that the plaintiff made a motion in the Ray county Circuit Court for permission to practise in that court as an attorney-at-law without having taken the oath of loyalty, as required by the constitution of this State. The motion being granted, the Circuit Attorney for the State excepted, and tendered a bill of exceptions, which does not appear by this transcript to have been allowed and signed by the judge of the court below. The point which appears to have been raised, has already been decided in this court in the cases of the *State v. Garesché*, and the *State v. Cum-*

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mings (October term, 1865, at St. Louis). But this one does not come here in such a shape that we can take any notice of the case. There is properly no bill of exceptions, nor any appeal or writ of error. No attorney appears for either party. The case must be stricken off the docket.

Judge Wagner concurs; Judge Lovelace absent.

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STATE OF MISSOURI, Respondent, *v.* HANNAH THORNTON, Appellant.

Estoppel—Judgment—Evidence.—A conviction for an offence, also punishable by the laws of the State, by virtue of the ordinances of a municipal corporation authorized by its charter to punish similar offences, is a bar to a subsequent prosecution by the State. Where the record of the conviction under the ordinances of such corporation does not show conclusively the identical offence of which the party was convicted, parol evidence is admissible to show the identity of the offence.

Appeal from Buchanan Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

At the September term, 1865, of the Buchanan Circuit Court the appellant was indicted for keeping a bawdy-house. The defence relied upon, to the charge contained in the indictment, was previous conviction for the same offence, obtained against the appellant in the recorder's court of the city of St. Joseph.

The judgments of conviction were offered in evidence, and also the charter of the city, giving the corporation power to punish for misdemeanors of this description, and an ordinance passed in pursuance thereof.

The appellant introduced as a witness J. B. Hawly, the recorder of the city of St. Joseph, and offered to prove by him that the testimony upon which she was convicted and fined in the recorder's court was the same introduced on the part of the State in this cause, and that the witnesses who testified for the prosecution in the Circuit Court were

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the same who had given testimony against her before the recorder. This evidence was objected to on the part of the State, and rejected by the court.

Two questions arise—the action of the court in excluding the evidence of Hawly, and the refusal to instruct the jury that the conviction and judgment in the recorder's court constituted a bar.

As the indictment here charges the offence to have been committed on several and distinct occasions, and the record of the recorder's court could not show conclusively the identical offence for which she was convicted, oral testimony was perfectly competent to show that they were one and the same.

The remaining point is so well settled in this State that it would be idle to discuss it. No doubt is entertained about the power of the Legislature to create municipal corporations, and invest them with authority to pass ordinances for police regulations, and to punish persons for their violation. And where a properly constituted court, acting under the authority of an ordinance of a municipal corporation, punishes a person for violation of that ordinance, he cannot be again punished for the same offence, under the general laws of the State. (State v. Simonds, 4 Mo. 414; State v. Cowen, 29 Mo. 330.)

The judgment is reversed and the cause remanded.

Judge Holmes concurs; Judge Lovelace absent.

THORNTON T. EASLEY, Plaintiff in Error, *v.* DAVID PREWITT
et als., Defendants in Error.

Petition—Relief—Demurrer.—A petition is not subject to demurrer, because it asks for a judgment not warranted by the averments. The court may grant any relief consistent with the case made by the evidence and embraced within the issues.

Error to Linn Circuit Court.

The petition set forth a contract made with plaintiff by

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defendants for the building of a church, alleged the performance of the contract, the acceptance of the work, and the amount due thereon; and then alleged, that more than three months before the commencement of this action, he gave the said defendants notice in writing that he would proceed to enforce his lien, by the sale of said church property, as is provided in said contract heretofore mentioned, for the purpose of paying the balance due and owing him for the building of said church. Wherefore plaintiff asks judgment against the said defendants, trustees of said church, for the sum of nine hundred and twenty dollars, and the interest due thereon, and an order for the sale of said lots, and the said building thereon, for the purpose of satisfying said judgment, and for other proper relief. A demurrer to the petition was sustained.

Geo. W. Easley, for plaintiff in error.

I. There was no improper joinder of causes of action. All of the allegations of the petition were about the same subject of action, and all of the causes of action were against the defendants, in their character as trustees. (2 R. C. 1855, p. 1228, § 2.)

II. If the relief asked was not in accordance with the matters alleged in the petition, it was not a cause for demurrer. (*Ashby v. Winston*, 26 Mo. 210; *Northercraft v. Martin*, 28 Mo. 469; 2 R. C. 1855, p. 1280, § 12; *How. N. Y. Code*, 221, and cases there collected.) The contract, filed with the original petition, although asked to be made a part of the amended petition, could not be looked to for the purpose of determining the sufficiency of the amended petition. (*Curry v. Lackey*, 35 Mo. 389.)

III. There were sufficient facts stated in the petition to constitute a cause of action.

WAGNER, Judge, delivered the opinion of the court.

The demurrer in this case was improperly sustained. A petition is not demurrable because it asks a judgment not

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warranted by the averments; nor is its character always determined by the relief it prays for. The court may grant any relief consistent with the case made and embraced within the issues. (R. C. 1855, p. 1280, § 12; Northcraft v. Martin, 28 Mo. 469.) The petition stated a good cause of action on the agreement; but if the plaintiff wishes to foreclose his lien on the building, he ought to amend his petition, and set out the condition and the breach.

The judgment will be reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

W. H. HALEY, Appellant, *v.* DAVID BAGLEY, Respondent.

1. *Equity—Mistake—Parties.*—In a bill in equity, brought by the purchaser of land sold under a power given by a mortgage, to correct a mistake in the mortgage deed, the mortgagor is a necessary party.
2. *Mortgage—Vendors and Purchasers.*—A purchaser buying at a sale made by virtue of a power contained in a mortgage, buys at his peril.

Appeal from Sullivan Circuit Court.

The petition stated that defendant, by his deed of mortgage, conveyed to Charles Haley a tract of land—describing it—upon which stood a steam saw and grist mill, with boilers, machinery, &c., to secure a debt due to said Charles Haley, and that said deed contained a power of sale by said mortgagor, in default of payment. That it was intended that said deed should convey the mill, with its machinery, &c., but that by mistake, accident or fraud, the deed did not include the mill or machinery in its description. That under the power, Charles Haley sold the land, and plaintiff became the purchaser; that he was ignorant of the mistake at the time of his purchase, and prayed to correct the mistake, &c., so that the mill and machinery might be included. Charles Haley was not made a party to the suit. A demurrer was interposed, upon the grounds of defect of parties, and want of equity; which was sustained, and the plaintiff appealed.

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E. B. Ewing, for appellant.

WAGNER, Judge, delivered the opinion of the court.

It appears from the record that Bagley, the respondent, was the owner of certain real estate in Sullivan county, and was indebted to one Charles Haley in the sum of six hundred dollars. That for the purpose of securing the payment of the money so due, he executed and delivered to the said Charles Haley a mortgage on the premises, which mortgage contained a power authorizing him to sell the same, if default was made in the payment of the debt when it matured. The money not being paid at maturity, Haley, in pursuance of the power, proceeded to advertise and sell the property, when W. H. Haley, the defendant, became the purchaser, and received a deed from the mortgagee. The mortgage was duly recorded in the Recorder's office in Sullivan county. After the sale and conveyance, it was discovered that the land was not properly and correctly described in the mortgage, and the appellant filed his petition in the Circuit Court, in the nature of a bill in equity, charging that, through accident or mistake, or the fraud of respondent, the land was misdescribed, and alleging the insolvency of the respondent; and prayed that he might be restrained by injunction from committing waste on the premises, and also that the deed of mortgage to Charles Haley be corrected and reformed.

The petition was demurred to, because there was a defect of parties, a misjoinder of actions, and a want of equity. The demurrer was sustained, and an appeal taken.

The very gist of the petition was the relief asked for in having the deed of mortgage corrected and reformed, so as to accurately describe the property. The mortgage was made to Charles Haley, and he was a necessary and indispensable party to the complete determination of the matter.

There is no doubt about the powers of a court of equity to reform instruments or agreements, to make them conform to the intention of the parties. But this interference only ex-

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tends to the original parties, or those claiming under them, in privity, "such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts." (Sto. Eq. § 165.)

But by privity is here meant those claiming under the vendor. In this case there was no agreement or privity with the appellant. The mortgage was on record, and imparted full notice to him of what he was buying; the sale was open and notorious, and he bought at his peril. The allegation that he was ignorant of the mistake or misdescription at the time he purchased, will not help him.

There is no equity in the bill. Let the judgment be affirmed. Judge Holmes concurs; Judge Lovelace absent.

STATE OF MISSOURI, Appellant, *v.* WILLIS B. RAY, Respondent.

Crimes—Criminal Practice—Indictment.—(R. C. 1855, p. 567, § 39.) Indictment charging defendant with feloniously assaulting another with a deadly weapon, and feloniously wounding, &c., is good.

Appeal from Worth Circuit Court.

The indictment charged that the defendant, with a certain knife, of the length of six inches, which he, the said Willis B. Ray, in his hand held, and which was then and there a deadly weapon, and held feloniously, did assault one Elihu Rowin, and him, the said Elihu Rowin, then and there, with the knife aforesaid, feloniously did wound, contrary to the form of the statute, &c.

J. C. Parker, for appellant.

This is a case where the defendant was, at the September term, A. D. 1864, of the Worth Circuit Court, indicted for maiming and wounding, under circumstances which would

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have constituted murder or manslaughter if death had ensued, under section 39 of article 2, page 567, of R. C. 1855.

The defendant moved the court to quash the indictment, which motion was sustained, and the State appealed from the decision of the court on the motion to quash.

The indictment in this case is substantially good. (9 Mo. 852; 11 Mo. 579; 19 Mo. 678.)

HOLMES, Judge, delivered the opinion of the court.

This was an indictment under the 39th section of the "Act concerning crimes and punishments." On motion of the defendant, the indictment was quashed. The indictment charges all the facts necessary to constitute the offence, under said section. (Conrad v. State, 11 Mo. 579; Jennings v. State, 9 Mo. 862.) The motion should have been overruled.

Judgment reversed, and the case remanded. Judge Wagner concurs; Judge Lovelace absent.



STATE OF MISSOURI, Appellant, *v.* JOHN WEBB, Respondent.

Criminal Practice—Demurrer.—A demurrer, or motion to quash an indictment, must specify the grounds of objection. (R. C. 1855, p. 1176, § 24.)

Appeal from Daviess Circuit Court.

J. C. Parker, for appellant.

HOLMES, Judge, delivered the opinion of the court.

The indictment was quashed on motion of the defendant. The motion assigns no specific objections to the sufficiency of the indictment, which is drawn in accordance with the statute. (R. C. 1855, p. 565, § 35.)

We discover no good reason for sustaining the motion. Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Lovelace absent.

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STATE OF MISSOURI, Appellant, *v.* JASPER N. ROGERS, Respondent.

1. *Crimes—Military.*—A soldier in the army of the United States may be indicted for robbery, and prosecuted in the courts of the State of Missouri.
2. *Criminal Practice—Indictment.*—It is not necessary that the name of the prosecuting witness should be endorsed upon an indictment for felony.
3. *Criminal Practice—Writ.*—A clerical error in the date of a writ of *capias* issued, or in the return of service, is no ground for quashing an indictment.

Appeal from DeKalb Circuit Court.

J. C. Parker, for appellant.

I. It is no reason to authorize a court to quash an indictment that the defendant was a soldier in the army of the United States at the time of his being indicted. A soldier is as much subject to civil law as a civilian, upon the principle that the military is, and in all cases, and at all times, ought to be in strict subordination to the civil power.

II. The failure of a clerk to enter upon an indictment the day of its return into court, does not entitle the defendant to his discharge. (*State v. Clark*, 18 Mo. 432.)

The court below erred in not permitting the clerk thereof to make an entry *nunc pro tunc*, so as to have the record of such court correspond with the facts. (*State v. Clark*, 18 Mo. 432; 10 Mo. 359.)

III. The name of the prosecuting witness is not required by the rules of practice in criminal cases to be endorsed on the back of the indictment, as such, in any case, except in cases of trespass against the person or property of another, not amounting to a felony. (R. C. 1855, p. 1170.)

IV. There are two separate counts, improperly and illegally joined, for separate offences in this indictment, but it is a good and sufficient indictment for robbery, including the charge of larceny.

Moore & Rose, for respondent.

I. The defendant being in the United States service, any

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crime he might have committed while in such service was punishable alone by military court, unless he had been formally demanded, and the United States authorities saw fit to deliver him up to the State authorities, the United States authorities being superior to the State authorities.

II. Because the records show that the indictment was not properly filed with the clerk. It should be filed on the day it is presented by the grand jury, which certainly was not done unless Rogers was arrested under and by virtue of some other indictment.

III. The names of the prosecuting witnesses should have been endorsed on the indictment. (9 Mo. 268; 11 Mo. 510; 19 Mo. 224.)

IV. Because defendant was charged with both robbery and larceny, not properly joined so as to show that one was an ingredient or part of the other.

V. The record shows that it was impossible for the defendant to have been arrested for the offence charged in or by virtue of this indictment. He was arrested on the 8th of September, 1863, and the indictment was filed on the 9th day of September, 1863, at which time the writ issued.

HOLMES, Judge, delivered the opinion of the court.

The indictment was quashed on motion of the defendant. The reasons assigned for the motion were, in substance, as follows: 1. Because the defendant was a soldier in the United States army. 2. Because the indictment was never legally filed in court. 3. That the name of the prosecuting witness was not endorsed on the indictment. 4. That the writ was dated the 9th of September, 1863, and executed on the eighth day of September, 1863. 5. That two separate counts were improperly joined for separate felonies. 6. That the record did not show that the grand jury were sworn.

There was nothing in any of these objections. It did not appear on the face of the indictment that defendant was a soldier in the army of the United States, nor did it matter if he was a soldier. The indictment was in due form of law,

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charging the offence of robbery, and contained but one count, and was duly returned into court, endorsed a true bill by the foreman of the grand jury. The record shows distinctly enough that the jury were properly sworn. It was not necessary that the name of the prosecuting witness should be endorsed on the indictment. It does not appear by anything contained in the record that there was even a clerical error in the date of the writ or of the service; nor can any such mistake be a good reason for quashing the indictment. We think the court erred in quashing the indictment.

Judgment is reversed, and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.

STATE OF MISSOURI, Respondent, *v.* C. C. CROWLEY, Appellant.

Criminal Practice—License—Indictment.—An indictment, under the 4th section of the act, approved March 28, 1861, to prevent the adulteration of spirituous liquors in this State, which charges the defendant with unlawfully selling spirituous liquors, &c., without first having given bond, as required by the statute, is sufficient; the indictment need not negative the exceptions contained in § 6 of the act. (Acts 1860-61, p. 92.)

Appeal from Linn Circuit Court.

Vories & Vories, for appellant.

The indictment should either have stated facts sufficient to show whether it was intended to charge defendant for selling liquor without giving the bond required by the law concerning dramshops, (R. C. 1855, p. 648, § 8,) or whether it was for failing to give the bond required under the act to tax and license merchants, (R. C. 1855, pp. 1073-7, §§ 1-4 & 22,) or whether it was for selling liquors without giving the bond required by the law of 1861, entitled "An act to prevent the adulteration of spirituous liquors in this State." (Acts of 1860-61, p. 92.)

This indictment is uncertain. It should be so certain that

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the defendant could not be mistaken in reference to the specific crime with which he is charged, and so that the court can tell what judgment to render if a plea of guilty was pleaded by the defendant. (State v. Heelan, 6 Mo. 263; Dameron v. State, 8 Mo. 494; Conner v. State, 14 Mo. 561; 1 Arch. Crim. Pl. & Pr. 282, and notes; People v. Allen, 5 Denio, 76.)

Wright, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted at the April term of the Linn county Circuit Court, in 1865, for unlawfully selling spirituous liquors, without first appearing before the county court clerk of the county of Linn, and giving bond as required by law. He filed his motion to quash the indictment, and assigned as reason: "1. Said indictment does not charge sufficient facts upon its face to constitute any offence under the law. 2. The indictment does not negative the exceptions named in the 6th section of the act under which this indictment is found. 3. The indictment is in other respects defective, informal and insufficient.

The court overruled a motion to quash, and on a trial the defendant was found guilty and fined fifty dollars.

The indictment is founded on the fourth section of "An act to prevent the adulteration of spirituous liquors in this State," approved March 28, 1861, which declares that it shall not be lawful for any person or persons to sell or offer to sell any spirituous or alcoholic liquors within the State, until he, she, or they, shall first appear before the county court clerk of the county where such liquors are to be sold, or offered for sale, and take and subscribe to an oath not to mix or adulterate, with any substance whatever, the liquors offered for sale; and give bond in the sum of five hundred dollars, with good and sufficient security for the payment of all costs arising from prosecution for the violation of the provisions of this act."

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The principal objection relied on is, that the indictment does not negative all the exceptions contained in the section. It states that defendant failed to appear before the county court clerk and give the required bond, but omits to state that he did not take and subscribe the oath which is also rendered necessary.

The selling liquor in violation of law is the gravamen of the offence. And to make the selling lawful, it was incumbent on the defendant to comply with the requisitions of the law. His appearance before the county court clerk, taking and subscribing the oath, and giving bond were all essential prerequisites. Neither could be dispensed with. Suppose he appeared before the clerk, and took and subscribed the oath, that would not authorize him to sell without he gave a bond also. And so if he appeared and gave bond, he must in addition take and subscribe the oath. For aught that appears he may have taken and subscribed the oath, yet his failure to give bond rendered the selling unlawful.

The omission to do either of the acts specified in the section, prior to selling liquor, is sufficient to constitute an offence against the law. The indictment is sufficiently certain and definite, and the judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

JAMES O'DONOGHUE, Plaintiff in Error, *v.* WASH. JONES,
Defendant in Error.

Contract—Fraud—Payment.—Where a party sells land and takes in payment certificates of stock of an incorporated company, in the absence of any fraud or misrepresentation, he cannot recover for the price of the land because the stock subsequently turns out to be valueless.

Appeal from Buchanan Common Pleas Court.

Plaintiff sold to defendant a tract of land and received in payment shares of stock in a land association, regularly incorporated, known as the Central City Land Company. The

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stock was taken at its value in the market at the time. There was no charge or evidence of any fraud or misrepresentation made by the defendant as to the value of the stock. Subsequently the stock became worthless.

Vories & Vories, for plaintiff in error.

Woodson, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The petition in this case does not allege that there was any fraud, misrepresentation, or unfair dealing on the part of the defendant. The answer avers that the plaintiff was equally familiar and conversant with the solvency of the company, and the value of the certificates, with the defendant; that the proposition to purchase and receive the certificates in payment for the purchase money, came from the plaintiff; that there was no attempt made to overreach or circumvent the plaintiff; but that the whole transaction was perfectly fair, and conducted by both parties in good faith.

The evidence fully sustains the statements in the answer. And it further shows that the market value of the stock, at the time the trade was made and the conveyance executed, was from two hundred and fifty to three hundred dollars per share. The assignment, under the circumstances, was no warranty that the certificates possessed or should possess any certain value. There was neither warranty nor representation as to any particular value being affixed to them. They were selling in the market at a certain price; the plaintiff was perfectly aware of the condition of the company that issued them, the price for which they were selling in the market, and proposed selling his property to defendant, and receive them in pay; which proposition was accepted by defendant.

At the time of the sale the market value of the certificates was about equal to the value of the property, but afterwards they became worthless. The plaintiff is in a condition that a great many other men have been placed before him; he

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has lost by purchasing the shares of a worthless and irresponsible company; but we cannot see what claim he has either in the law, equity, or morals, to compel the defendant to pay for his own want of judgment and prudence.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

STATE OF MISSOURI, Appellant, *v.* THOMAS MORPHIN, Respondent.

Crimes—Larceny.—The stealing of several articles of property at the same time and place, although belonging to several persons, constitutes but one offence.

Appeal from Worth Circuit Court.

J. C. Parker, for appellant.

The indictment charges the defendant with but one offence, which was the feloniously stealing, taking, and carrying away of the property of different persons at the same time and place.

The circumstances of several ownerships of the property does not increase or mitigate the offence. (*Sutton v. State*, 7 Mo. 55.) And the stealing of several articles of property at the same time and place, constitutes but one offence. (7 Mo. 55.)

HOLMES, Judge, delivered the opinion of the court.

The court below quashed the indictment, on motion of the defendant, for the reason that the defendant was charged with stealing the property of two different persons, at one and the same time, the value of the property taken from one being less than ten dollars. This was erroneous. The stealing several articles of property at the same time and place constitutes but one offence. (*Lorton v. State*, 7 Mo. 55.)

Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Lovelace absent.

State v. Fox—State v. Bedford—Pitts & w. v. Winston.

STATE v. WILLIAM FOX.

Two cases, appeals from Linn Circuit Court, decided by case of State v. Crowley.

STATE v. ALEXANDER M. BEDFORD.

Stricken from docket, transcript showing no appeal or writ of error.

JOHN E. PITTS AND WIFE v. JOHN H. WINSTON.

Error to Platte Common Pleas. Dismissed for failure of plaintiff in error to file brief.

[END OF FEBRUARY TERM, 1866.]

by

or

of

CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF MISSOURI, MARCH TERM, 1866, AT ST. LOUIS.

CYPRIAN BILLON AND WIFE, Appellants, *v.* WILSON L. LARI-MORE *et al.*, Respondents.

1. *Limitations—Disabilities.*—The disability of coverture cannot be tacked upon that of infancy so as to make one continuing disability. Where two or more disabilities exist together at the time the cause of action accrues, the statute of limitations will not begin to run until the last one is removed; but where one exists when the cause of action accrues, the statute will begin to run when that expires, notwithstanding others arise in succession afterward.
2. *Practice—Pleading.*—It is improper to state matters of equity in the body of a count at law.

Appeal from St. Louis Land Court.

This was an action by appellants to annul certain deeds, and for possession of 471 arpens of land in St. Louis county, being U. S. survey No. 141, in the name of John Graham. Graham conveyed the land to his daughter, Margaret Graham, by deed dated March 28, 1812. Soon after said conveyance Margaret intermarried with Michael Connell, she

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then being between 16 and 17 years of age ; she died in the fall of 1813, at the age of 18 years, leaving the plaintiff, Mary Connell, her only child, then an infant of a few months old, and only issue by said marriage. Said Mary Connell (one of plaintiffs) intermarried with (plaintiff) Cyprian Billon on the 14th day of May, 1829, and they continued to be husband and wife up to the commencement of this suit.

Michael Connell (husband of Margaret Graham and father of Mary Billon, plaintiff) was alleged by plaintiffs to have died in the year 1832, intestate. Defendants offered evidence to show that he fled the State in 1812, and was never heard of afterwards.

On the 7th day of July, 1812, Michael Connell and wife made a deed to Edward Hempstead, purporting to convey said land to said Hempstead, which deed was signed by said Margaret by her mark, &c. Edward Hempstead took possession of the land, after the death of said Margaret Connell, by renting the same to some person unknown. Hempstead died in 1817. The defendants offered evidence to show a continuous possession under that claim of title down to the commencement of the suit.

The plaintiffs' petition prayed for possession of the land in right of the wife (Mary Billon), on the grounds of inheritance from her mother, Margaret Connell, she being her sole heir. The petition also set out said deed from Michael Connell and wife, and prayed the same to be decreed by the court to be inoperative, null and void ; because there was no law, at the date of said deed, authorizing the husband and wife to convey the wife's real estate ; and because the wife had received no consideration for the same, and that said deed had not been executed and acknowledged according to law ; and because, at the time said deed was made, said Margaret Connell was an infant under 21 years of age.

Instructions asked and given on behalf of plaintiffs :

3. The jury are instructed, that if they find from the evidence that the plaintiff Mary Billon was seized of the land in question prior to 1829, and while so seized of the land, on

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the 14th day of May, 1829, intermarried with the plaintiff Cyprian Billon, and continued to be the wife of said Billon from that time up to the commencement of this suit, that then any possession of the said land held adversely to said plaintiffs, which possession commenced since the said 14th day of May, 1829, is no bar to plaintiffs' right of recovery in this suit.

6. To enable the defendants, or any one of them, to avail themselves of the statute of limitations, as set up by each defendant in his separate answer to plaintiffs' petition, it must appear by proof to the jury that the possession of the portion of the land in question, which is admitted by such defendant to be in his possession, must have commenced before the 14th day of May, 1829, and must have been held adversely to all other persons, from that time up to the commencement of this suit, by actual entry upon said portion of the land in question, admitted to be in possession of such defendant by such defendant, or those under whom he claims; if the jury, therefore, find from the evidence that either of such defendants had not such actual possession, commenced before the 14th May, 1829, and continued from that time to the commencement of this suit, the jury ought to find for the plaintiffs, on the defence raised by such defendant, on the statute of limitation, for that portion of the land admitted by such defendant to be in his possession; provided that the said jury also find that the said plaintiffs were intermarried together on the 14th May, 1829, and have continued to be husband and wife from that time to the commencement of this suit.

9. If the jury find from the evidence that Margaret Graham intermarried with Michael Connell in the year 1812, and at the time of said marriage was a minor, and also that she was seized of the land in question at the time of her said marriage, and that she died in 1813, still a minor, and wife of said Connell up to the time of her decease, and that she left the plaintiff Mary Billon, then an infant, her only child and lawful issue of said marriage,—then, at the time of the death of said Margaret, the title to the land in question became vested in said daughter Mary.

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The court instructed the jury, on the part of the defendants, as follows :

1. If the jury find from the evidence that the defendants, and those under whom they claim title, by deed, decree, or will, have had and held possession, open and notorious, of the whole of said farm, claiming for himself, or themselves, or for other persons claiming under the same Hempstead title, by occupying the house thereon, or cultivating fields thereon, during the whole period from the 1st day of May, 1829, until the commencement of this suit in 1860, then the jury should find for the defendants.

2. If the jury find from the evidence that the defendants, and those under whom they claim title, by deed, or decree, or will, have had and held possession, open and notorious, of the whole of said farm, or of a part of said farm, claiming the whole for himself, or themselves, or for other persons claiming under the same Hempstead title, by occupying the house or houses thereon, or cultivating fields thereon, during the whole period from the year 1812 until the commencement of this suit in 1860, then the jury should find for the defendants.

3. If the jury find from the evidence that the person, under whom the defendants claim the possession in question, entered into the possession of said premises, claiming to own the same, prior to the marriage of said Mary to Cyprian Billon, and that at the time of said marriage she was within the age of 21 years, then the statute of limitation commenced to run against the said plaintiffs as soon as the said Mary arrived of age ; and if the defendants, and those under whom they claim title, have had and held open, notorious, continued and adverse possession of the said premises for twenty years after the said Mary arrived of age, and before the commencement of this suit, then the plaintiffs cannot recover, and the jury will find their verdict for the defendants.

The court refused to give the following instructions asked by the plaintiffs :

1. If the jury find from the evidence that John Graham

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was seized of the land in question in the year 1812, and that on the 28th day of March, 1812, when so seized, conveyed said land to his daughter Margaret, and that said Margaret was a minor, and while such minor, in the year 1812, intermarried with Michael Connell, and by which marriage she had issue born, a daughter, who was named Mary, and who was her only child, and that said Margaret died in 1813, intestate, and without having made any legal conveyance of said land, and that at the time of her death she was a minor under the age of 21 years,—that then, at the time of the death of said Margaret, the title to the said land became vested in her said daughter Mary Connell, except such interest as might have been passed to said Michael Connell, as surviving husband, by the courtesy; and if the jury also find that the said Connell subsequently, and before the commencement of this suit, died, that then the entire interest and title to said land became vested in Mary Connell; and if the jury also find that said Mary Connell, while she was a minor, and at or about the age of 17 years, intermarried with plaintiff Cyprian Billon in 1829, and that they are the plaintiffs in this suit, and that said Mary has been the wife of said Billon from said marriage up to the commencement of this suit, that then the jury ought to find for the plaintiffs.

2. If the jury find from the evidence that Margaret Graham was seized of the land in question, and was a minor when she intermarried with Michael Connell, and that she died before she arrived at the age of 21 years, and she left at the time of her death the plaintiff Mary Billon, her only daughter and heir, who was then an infant, and that the said Mary intermarried with the plaintiff Cyprian Billon when she was a minor, and continued to be a married woman and the wife of said Billon up to the time of the commencement of this suit, that then the defence as set up by the defendants under the statute of limitation is no bar to plaintiffs' right of recovery.

4. If the jury find from the evidence that Edward Hempstead died in 1817, or about that time, and partition was

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made in 1827 of all the interest and claim of Edward Hempstead to the land in question between the heirs and devisees of said Hempstead ; and by said partition the north half of said tract was set apart and conveyed to Joseph Hempstead, Stephen Hempstead, Thomas Hempstead, and Samuel Hempstead ; and that the south half was set apart to Sarah Beebe, Edward H. Beebe, and Mary H. Beebe,—that then after said partition each one of said portions of said tract so set apart became separate and distinct tracts of land, as far as the said parties to said partition and claiming under Edward Hempstead were concerned ; and that after that time the possession of either one of said halves by the parties claiming under said partition was no possession of the other half ; and that any possession or occupancy of either half of the said partition by any other person than the parties to said partition or some of them, or under them or some of them, cannot be set up by the defendants, or either of them, in support of their defence as set up under the statute of limitation, as showing a continuance of possession down from Edward Hempstead.

5. If the jury find from the evidence that partition of the land in question was made in 1827 between the heirs or devisees of Edward Hempstead, and that the north half was set apart to Joseph, Stephen, Thomas and Samuel Hempstead, and that the south half was set apart to Sarah, Edward H. and Mary H. Beebe, and at that time said land was unoccupied,—that then, unless the jury find from the evidence that the said north half of said land was occupied by, or in possession of Joseph, Stephen, Thomas and Samuel Hempstead, or some of them, or under their or some of their authority, between the date of said partition in 1827 and the 14th May, 1829, the defence as set up by the defendants, or either of them, under the statute of limitation, is no bar to plaintiffs' right of recovery for said north half; and unless the jury find from the evidence that the south half of said land was occupied by or in possession of said Sarah, Edward H. and Mary H. Beebe, or some of them, or under their or

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some of their authority, between the date of said partition in 1827 and the 14th day of May, 1829, the defence as set up by the defendants, or either of them, under the statute of limitation, is no bar to plaintiffs' right of recovery of said south half; provided, in each case, that the jury also find that plaintiffs Cyprian Billon and Mary Billon were intermarried together on the 14th day of May, 1829, and continued to be husband and wife from that time up to the commencement of this suit.

7. If the jury find from the evidence that Edward Hempstead died in 1817, and that partition of the land in question was made between the heirs or devisees of said Edward Hempstead in 1827, that then the defendants, or either of them, cannot avail themselves, under their defence set up under the statute of limitation, of the possession of said tract of land, or any part of it, by persons claiming to be tenants of Edward Hempstead subsequently to that time, nor by any person not a party to said partition claiming the land as their own.

8. The jury are instructed that if they find from the evidence that Margaret Graham and Michael Connell intermarried together in the year 1812, and at the time of said marriage said Margaret was a minor and was seized of the land in question, and that said Margaret was a minor and a married woman on the 7th day of July, 1812; that then the paper purporting to be a deed from said Michael Connell and his wife (said Margaret) to Edward Hempstead, dated 7th day of July, 1812, which was read in evidence by defendants, conveyed no title to Edward Hempstead to the land in question, and it, or any other conveyance of said land by said Hempstead, conveyed no title to said land to any of defendants, or those under whom they claim, by reason of said deed from Connell and wife to said Hempstead, and all claim of title under it need not be noticed by the jury in their deliberations in making up their verdict.

10. The defence of limitation raised by the defendants Edward Walsh, John Price, and John L. Finney, each against

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plaintiffs' right of recovery of the portion of the land in question, admitted by said defendants to be in his possession, is not supported by proof of occupancy or possession by other persons than the defendants, or those under whom such defendants claim, without also showing by proof on the part of such defendants that such other persons so occupying were the tenants of such defendants, or of those under whom such defendants claim; and, in the absence of such proof, the jury ought to find for the plaintiffs on the defence of limitation raised by said defendants.

C. C. McLure, for appellants.

I. The deed and mortgage from Michael Connell and wife to Edward Hempstead were improperly admitted in evidence to the jury on the part of defendants to show title in defendants.

1. Because plaintiffs' petition set out said deed and mortgage, and prayed them to be decreed by the court inoperative, and to be set aside, on the grounds that the property pretended to be conveyed by them was the property of the wife, given to her by her father for the special consideration of maintenance; that at the date of said deed she was a minor; that she had never received any consideration; that she had never legally executed or acknowledged them before any person authorized by law to take acknowledgments of a married woman, to convey her separate real estate.

The court erred in refusing the 8th instruction asked by plaintiffs. (*Down's heirs v. Down's heirs*, 2 How. 915; *Smith v. Mount*, 1 Mo. 671, t. p. 479; *Miller v. Wells*, 5 Mo. 6.)

2. Each defendant answering separately, and setting up the statute of limitation against the plaintiffs' right of recovery for that portion of the land in question claimed by him in his answer, can only apply to such portion as he claims in his answer. After partition of the land, in 1827, among those claiming as heirs or legatees of Edward Hempstead, the land became two separate tracts as far as the parties to the partition, or those claiming under them, are concerned;

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and since that time, the possession of one-half is no possession of the other half by the respective parties claiming their separate portion.

On this point the court erred in refusing the 4th, 5th and 7th instructions asked by plaintiffs. (*Cheney v. Ringgold*, 2 Har. & I. 87; *Sharp v. Brandon*, 15 Wend. 597; *Jackson v. Creal*, 13 Johns. 116, 174; *Commonw. v. Baldwin*, 1 Watts, 54.)

3. The statute of limitation never commenced to run against plaintiff Mary Billon; she intermarried with plaintiff Billon on 14th May, 1820 (then a minor). Michael Connell, surviving husband of Margaret Graham, and father of Mary Billon, had a life estate in the land in question by the courtesy; said Connell died in 1832; no right of action accrued to her until after the death of said Connell, because of the particular estate in him during his lifetime. (*Heath v. White*, 5 Conn. 228; *Moore v. Jackson*, 4 Wend. 58; *Miller v. Shackleford*, 3 Dana, 289; *Clark v. Vaughan*, 3 Conn. 191; *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Mancius*, 2 Wend. 357; *Jackson v. Schoonmaker*, 4 Johns. 390; *Eaton v. Sanford*, 2 Day, 523; *McLane v. Moore*, 6 Jones Law N. C. 520; *Jernet v. Lynn*, 31 Penn. 94; *Shaw v. Alexander*, 32 Miss. [3 George] 229.) And the deed from Connell and wife to Edward Hempstead makes no difference on this point; for if that deed conveyed Connell's life interest in the land, it still was a particular estate vested in Hempstead during the life of said Connell, and ended with his death in 1832. (*Reaume v. Chambers*, 22 Mo. 36.)

The instructions given by the court to the jury on behalf of defendants take this question entirely from the jury: these instructions direct the jury, that any possession which commenced prior to 1st May, 1829, is a bar to plaintiffs' right of recovery—which misled the jury. These instructions are erroneous.

4. The plaintiffs' right of recovery is not barred by limitation. In order to bring a possession within the statute of limitation, the possession must be an actual and continued

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possession. The facts do not show such a continued possession as to be a bar to plaintiffs' right of recovery. (Jackson v. Schoonmaker, 2 Johns. 230; Brandt v. Ogden, 1 Johns. 156; Jackson v. Waters, 12 Johns. 365; May v. Jones, 4 Litt. 21; Dade v. Good, 2 Overt. 394; Weatherhead v. Bledsoe, 2 Overt. 352; Purcheser v. Springer, 4 Mass. 416; Small v. Proctor, 15 Mass. 495; Hawks v. Senserman, 6 Serg. & R. 21; Harrison v. Cachelin, 23 Mo. 117; Chouquette v. Barada, 23 Mo. 231; Menkens v. Blumenthal, 27 Mo. 198; Nearhoff v. Addleman, 31 Penn. 279; 27 Mo. 412.)

5. No statute limiting real estate actions was ever passed in Missouri prior to Edward Hempstead's death in 1817, and the only law in force at the time of the commencement of this suit, of limitation, is the act of 1855; consequently, no limitation had commenced running in bar of plaintiffs' right of recovery. Limitation only begins to run after the passage of the act (unless the act itself specially provides for its retrospection). The law does not act retrospectively, but only prospectively. (Holyoke v. Haskins, 5 Pick. 20; Postmaster Gen'l v. Rice, Gilp. 554; Day v. Pickett, 4 Mumf. 104; Sayre v. Wisner, 8 Wend. 561; Taylor v. Taylor, 3 A. K. Marsh. 18; Tufts v. Rice, Breese App. 20; Griffith v. Bradshaw, 4 Wash. C. C. 171; Penns v. Ingram, 3 Wash. C. C. 90; Penrose v. Fleeson, 1 Yates, 344; Hull v. Minor, 1 Root, 223; Clark v. Vaughan, 3 Conn. 191; McIver v. Reagan, Cooke, 366; Paddleford v. Dunn, 14 Mo. 517.)

6. There must not only be an actual and continued possession, but some person capable of suing, before the statute of limitation can begin to run; and if two or more disabilities exist, they must all terminate before the act of limitation begins to run; and it matters not whether both disabilities commenced at the same time, so that both existed before the limitation commenced running. (Eaton v. Sanford, 2 Day, 523; Machir v. May, 4 Bibb, 43; Sentney v. Overton, 4 Bibb, 445; Sherman v. Shelton, 10 Yerg. 383; Wilcox v. Kilcanon, 4 Hayw. 186; Wood v. Ricker, 1 Paige, 616; Gibson

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v. Taylor, 3 McCord, 451; Garrett v. Wiggins, 1 Seam. 336; Robinson v. Roman, 2 Seam. 502; Gilliam v. Jockocks, 4 Hawks, 310; Marshall v. McQueen, 3 Litt. 468; White v. Hight, 1 Seam. 205.)

Hill & Jewett, for respondents.

I. The three instructions for the plaintiffs and the three instructions for the defendants put the law of the case fairly and fully to the jury, under the evidence upon the statute of limitations.

(a.) The plaintiffs insist that the disabilities of infancy and coverture are cumulative. The defendants say that the right of action accrued to Mary Connell Billon immediately upon the death of her mother and father. Michael Connell was never heard from after his indictment, and the presumption is that he died within seven years after 1812, or in 1819. Mary was married seventeen years after her father's disappearance, and her right of action had accrued before her marriage. Her only disability, then, was infancy, and she became of age in 1834, twenty-six years before suit.

II. The infancy of Mary cannot be united with her disability of coverture; and she had only twenty years to bring her suit after she arrived of age in 1834. (Mercer v. Selden, 1 How. U. S. 37; Ang. Lim. § 197, § 477, and cases cited in note; Dessaunier v. Murphy, 33 Mo. 184; Keeton's heirs v. Keeton's adm'r, 20 Mo. 530.)

III. The possession of the different parcels of the same land by different persons in succession, and in conformity with the title, is a continuation of the adverse possession; and the possession of one person of a part for the benefit of or under another person for another part of the same tract, is sufficient to constitute an adverse possession. (Ang. on Lim., § 477, and notes.)

IV. Adverse possession alone is sufficient to give title. (Biddle v. Mellon, 13 Mo.)

HOLMES, Judge, delivered the opinion of the court.

The case turns upon the statute of limitations. It was

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shown that John Graham, being seized in fee of the land in controversy, which he occupied and cultivated as a farm, by his deed dated March 28, 1812, conveyed the same to his daughter Margaret, then a minor ; that the daughter married Michael Connell, and died under age, in 1813, leaving an infant daughter, Mary, her sole heir-at-law ; and that Mary, born in 1813, married Cyprian Billon (plaintiff), May 14, 1829, while yet a minor.

A deed of this land from Michael Connell and Margaret his wife to Edward Hempstead, under which the defendants claimed title and possession, dated July 7, 1812, was offered in evidence on the part of the defendants. Upon objections of the plaintiffs to the validity of this deed as a conveyance of title, it was excluded by the court as such, but was allowed to be read to the jury for the purpose only of showing that the possession taken by the grantee of the land described in it, was by claim and color of title. For this purpose the instrument was clearly admissible ; and there was evidence tending to show that Edward Hempstead, the grantee, by himself or tenants, took possession of the land soon afterwards, and held the same continuously until his death, in 1817. Thus stood the case before the jury, so far as this deed was concerned ; and the question, whether the deed conveyed a valid title in fee, or the life estate of the husband by the courtesy, was wholly immaterial to the issue on trial. The petition stated certain facts concerning the execution and acknowledgment of this deed by the wife, looking to equitable jurisdiction, and prayed that the same might be set aside and annulled. These statements were insufficient to entitle the plaintiffs to relief under any head of equity jurisprudence.

The petition contained a cause of action in ejectment, stated with the requisite degree of clearness and certainty, though unnecessarily and improperly overloaded with details of evidence ; and upon this cause of action the trial proceeded. It is improper to stuff matters of equity into the body of a count at law. The parties having in effect elected to proceed upon the cause of action in ejectment, these equita-

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ble matters were very properly disregarded as surplusage. When the adverse possession began, and the cause of action accrued to the plaintiff Mary, she was still a minor unmarried. By her marriage with the plaintiff Cyprian Billon, while yet a minor, the disability of coverture may indeed be said to have been superadded to the other; but the statute, nevertheless, began to run against her when the disability of infancy expired in 1834. The plaintiffs seek to tack the disability of coverture upon that of infancy, and to avail themselves of both as one continuing disability. This cannot be done. Where two or more disabilities exist together at the time the cause of action accrues, the statute of limitations will not begin to run until the last one is removed; but where but one exists when the cause of action accrues, the statute will begin to run when that expires, notwithstanding others arise in succession afterwards. This is too well settled to admit of doubt. (*Mercer v. Selden*, 1 How. U. S. 37; *Keeton v. Keeton*, 20 Mo. 530; *Dessaunier v. Murphy*, 33 Mo. 184; *Ang. Lim.* 206-9.)

The case depended, then, wholly upon the question of adverse possession. By the laws then in force, when the statute began to run against the plaintiffs, they had twenty years in which to bring their suit. It was not brought within that time, and their right of action was wholly barred, and absolute title vested in the defendants; provided only that they, and those under whom they respectively claimed, could establish an adverse possession reaching back to a time anterior to the commencement of the disability of coverture. For this purpose they offered evidence tending to prove that they had respectively held under derivative titles by deed from Edward Hempstead, and under the adverse possession which he took in 1812, and continuously held under claim and color of title by deed from the mother of the plaintiff Mary; that the successive occupants ever afterwards had held possession of the land, or some part of it, claiming the whole, under that title, for themselves, or under those holding in privity with that title, either for them or their tenants; and that the possession

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had accompanied that claim and derivation of title in one continuous and unbroken chain down to the time when the plaintiffs' right was barred, and even to the commencement of the suit. The matters of fact were to be determined by the jury, under the instructions of the court. We have examined the evidence so far as to be satisfied that there was an ample basis in the evidence for the instructions which were given for the defendants. These instructions laid down the law correctly as applicable to such a case; no error is suggested in them; and, together with those which were given for the plaintiffs, they submitted the questions of fact fairly and intelligibly to the jury.

The first and second instructions which were refused for the plaintiffs, involving the question of cumulative disabilities, were rightly refused, for reasons already stated. The propositions of the fourth, fifth, seventh and tenth, relating to adverse possession, were substantially contained, so far as material, in those which were given; and the eighth, respecting the deed of Connell and wife to Edward Hempstead, was upon a matter not in issue, and wholly immaterial.

The jury having found for the defendants, under correct instructions, and there being no error to the prejudice of the rights of the plaintiffs, the verdict will not be disturbed. Judgment affirmed; and judgment will be entered as of the day when the cause was submitted. The other judges concur.

HENRY T. LUCKETT, Respondent, v. ANTHONY C. WILLIAMSON, Appellant.

Vendors and Purchasers—Title.—A vendor may enforce a specific performance of a contract for the sale of lands, if he can show a good title at the time of trial or decree.

Vendors and Purchasers—Statute of Frauds.—A purchaser may insist upon the defence of the statute of frauds, although he confess the parol agreement. (R. C. 1855, p. 1238, § 47.) A part performance, by the vendee, of a parol contract for the sale of lands will not avail the vendor.

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Appeal from the St. Louis Land Court.

This was a suit to enforce the specific performance of a contract for the sale of a tract of land in St. Charles county.

The petition stated that on October 6th, 1857, he sold to the defendant a tract of land in the Portage des Sioux common fields, part of lots 122, 123, 124, 125, and 126, and then describing the same by courses and distances, and containing 159 44-100 acres; that by the terms of sale, \$2,500 were to be paid in cash, \$2,500 on October 1, 1858, and \$2,500 on October 1, 1859, the deferred payments to bear interest from October 6, 1857; that defendant paid \$2,500 in cash; that it was agreed that as soon as a survey could be made, plaintiff should make and deliver a sufficient deed with covenants of warranty, and that defendant should give his notes for the deferred payments, secured by deed of trust; that plaintiff gave defendant a receipt setting forth the terms of sale; that plaintiff tendered defendant a bond for a deed, which defendant refused; that defendant took possession of said land in October, 1857, and has retained the same; that defendant refused to make the deferred payments; that he tendered defendant a deed with warranty; that he brought into court a deed dated August 13, 1861; and praying judgment for \$5,000, with interest from October 6, 1857, and that said judgment be enforced by a sale of the land.

This suit was commenced August 15, 1861. The defendant filed his answer, at the September term of the court, denying that he bargained for the land as described in the petition, and alleging that the plaintiff, representing that he had good title to the farm then claimed by him, and that said farm contained 160 acres, and that he knew that by a survey made only 27 acres were under the waters of lake Marais Temps Clair; that he did bargain for said farm at the sum of \$7,500, and paid \$500 cash, and that he was to pay \$2,000 on October 1, 1857, when plaintiff was to give him a good warranty deed, securing an indefeasible title in fee simple, and defendant was to give his notes; that by

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the contract there were to be but 27 acres in the lake, whereas there were 44 acres under the waters of said lake; he denied that plaintiff tendered a bond for a deed; denied that he was to give a deed of trust; denied that plaintiff tendered a deed conveying title; and denied that the plaintiff had the title to convey; alleged that the contract on his part was verbal, not witnessed by any writing signed by him; specified the defects of title; alleged that he had made valuable improvements; and prayed judgment for the \$2,500 paid, with interest, and for the value of the improvements; and offered to surrender possession upon being paid.

By consent of parties, the venue was changed to the St. Louis Land Court, in which the defendant filed an amended answer, setting forth the same matters, and pleading the statute of fraud expressly, and claiming its benefit, offering to surrender possession, and praying that the value of his improvements be set off against rents and profits; that he might have judgment for the \$2,500 paid, and interest, and that the land might be sold to pay the same.

At the trial in the Land Court, plaintiff called from defendant's possession, and read in evidence, a receipt given by him to defendant, dated August 31, 1857, stating: "Received of A. C. W. \$500 in part pay of my farm, which I have this day sold him for \$7,500, to give possession October 1, 1857, upon his paying \$2,000, and giving his notes with interest, when I am to give him a general warranty deed, retaining a lien for the notes."

Plaintiff also gave parol testimony as to the contract of sale; proved a tender of the deed dated August 13, 1861, on August 14, 1861.

Defendant then proved the defect of the title to part of the land, in the heirs of Whittley, and showed from the record of a suit of one St. Louis v. Luckett, that he knew of the defects. He also offered testimony to show that by the contract there were to be but 27 acres in the lake; and proved the value of his improvements. The title to the Clement lot, No. 125, had been made good since the sale. In rebuttal,

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plaintiff offered evidence as to the conversation at the time of the sale ; then read a deed from the heirs of Samuel Whittley, dated June 29, 1860, conveying the Whittley lot, No. 122 ; an act February 10, 1864, (Sess. Acts, 1863-4, p. 279,) authorizing Adeline Whittley, a minor, to make the deed ratifying the previous deed in which she had joined ; a deed from said Adeline Whittley, dated April 16, 1864, but a few days before the trial ; a deed from Wm. A. Whittley, dated December 9, 1863.

Thomas Whittley, the confirmee of lot 122, died 1816, leaving issue, 1, Paul ; 2, Nancy, wife of John Patton ; 3, Samuel, who left issue, Angelina, wife of Austin A. Clark ; Mary, wife of S. J. Melvin ; William A., and Adeline. Patton and wife, and the issue of Samuel Whittley, all joined in the deed of June 29, 1860.

Paul Whittley died about 1836, leaving a widow. At the sale, plaintiff did not have the Clermont title, but had procured it before the trial.

Whittelsey, for appellant.

I. That the appellant was entitled to have the land with a good and complete title, was decided in the former case between the same parties—31 Mo. 54. (Washington et al. v. Ogden, 1 Black., U. S., 540.) The plaintiff did not at the trial show a perfect title. As Paul Whittley took by descent one-third of the Whittley lot, his widow, there being no issue, took one-half of his real estate absolutely. (R. C. 1835, p. 228, § 3.) The words of the Code are, “shall be entitled,” not “shall be endowed,” as in the first section, and to that interest her heirs are entitled if she be dead. There is no evidence of any administration, nor of any will.

II. Defendant may insist upon the statute of frauds, although he confess the contract as stated. (R. C. 1855, p. 1238, § 47; R. C. 1855, p. 807, § 5; Notes to Lester v. Foxcraft, 1 Wh. & Tud. L. C. Eq. 567, 573; 2 Sto. Eq. § 757; Moore v. Edwards, 4 Ves. 23; Cooth v. Jackson, 6 Ves. 12; Rowe v. Teed, 15 Ves. 375; Sir Wm. Grant's opin-

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ion in Blagden v. Bradbear, 12 Ves. 471; Whitbread v. Brockhurst, 1 Bro. Ch. 407; Whitehurst v. Bebis, 2 Bro. Ch. 569; Hook v. Turner, 22 Mo. 333, 335.)

The defendant denies the contract, as alleged, and charges that there were to be but 27 acres in the lake, whereas there were 44 acres of land which were of no value to the defendant.

The receipt given by plaintiff requires parol proof to identify the land, and the contract could not on that memorandum be enforced as against him. (King v. Wood, 7 Mo. 389; Falman v. Dent, 3 Due. 395; Abel v. Radcliffe, 13 J. R. 297; Blagden v. Bradlee, 12 Ves. 466.) And as the defendant denies the contract as alleged, if it be enforced at all it must be enforced as he states it.

III. The decree is erroneous in requiring the whole of the unpaid purchase money, with interest from October 1, 1857, to be paid *instanter*, and that the land be sold immediately.

The charge of interest for the whole period since the sale was erroneous. If vendee offer to rescind on getting back his money, he need not pay interest. (Rutledge v. Smith, 1 McCord. Ch. 399, interest refused until title tendered; Osborne v. Bremas, 1 Dessauss. 486; Wightman v. Reeside, 2 Dessauss. 578.)

The judgment of the court treats this case as if it were a suit at law upon an executed contract for the purchase money, whereas it is a bill in equity to compel the specific performance of an executory contract, the terms of which the defendant denies as alleged, and sets up a variation. He does not even confess the contract as alleged, but varies it; and the plaintiff does not accept the contract as varied, and pray it to be enforced as claimed by defendant, but demands that his own claim be enforced.

The plaintiff does not offer to do equity; he claims a legal right, which it is shown he does not have.

IV. The submissions of the answer do not bind the defendant when the plaintiff amends his bill. (Ld. Abingdon v. Butler, 1 Ves. 206, 210.) They could only be binding

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when the defendant varies the contract, and submits to perform it as varied, and does not rely upon the statute. If the plaintiff amend and accept the contract as defendant offers to perform it, it would then be too late for the defendant, in his answer to the amended bill, to insist upon the statute. That would only be in cases where the plaintiff accepted, as was the case in *Spurrier v. Fitzgerald*, 6 Ves. 548, and then the defendant could not deny his submission. But that is not this case. (*Burgess v. Wheate*, 1 Ed. Ch. 24; 15 Ves. 353; *Roberts v. Massey*, 13 Ves. 561.)

Lewis, for respondent.

I. The plaintiff exhibited at the trial below a perfect title to the land contracted for. The only objection raised against it by appellant is, that the dower right of Paul Whittley's widow is outstanding in her heirs. But it does not appear that dower was ever assigned to her. Consequently she had no descendible estate; none that either she or her heirs could ever maintain ejectment upon, or that could even be sold under execution. (*Waller v. Mardus*, 29 Mo. 27.)

There was, therefore, no title outstanding in the heirs of Paul Whittley's deceased widow. The statute (R. C. 1835, p. 228, § 3,) treats of the right of the widow as widow and dowress, and not as an heir.

II. While it may be admitted that a defendant can insist on the statute of frauds, and at the same time admit the existence of the contract as stated, yet it by no means follows that he may in the same breath claim the benefit of the statute and the benefit of the contract. This would be, as the defendant has attempted to do in this case, claiming a specific execution, or damages for the non-performance of an absolutely void contract, which never had any legal existence at all. But this proposition was disposed of in a former case about the same subject matter. (*Luckett v. Williamson*, 31 Mo. 54.) It can make no difference whether the contract in question be that alleged by the plaintiff, or one which the defendant sets up in his place. The principle is the same.

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Respondent insists further that defendant was precluded by the evidence from setting up the statute of frauds. The contract was executed by the vendor's delivery of possession. (Sug. Vend. 84; Bean v. Vallé, 2 Mo. 109, [135]; Chariot v. Sigerson, 25 Mo. 63, 65; Young v. Montgomery, 28 Mo. 604.)

III. All the points made by appellant on the subject of interest proceed upon the following assumptions, viz: 1. That the contract as stated by plaintiff, was disproved on the trial; 2. That the contract as stated by defendant, was established by the evidence; 3. That the defendant never was in default, but the plaintiff having forfeited his contract, the defendant had the right to offer to rescind, etc.

It has long been settled that failure of title is no breach of a contract for a warranty deed, nor even of the warranty itself, unless there has been an actual eviction under the superior title. (Shelton v. Pease, 10 Mo. 473, 482; Streeter v. Henley, 1 Car., Ind., 401; Greenby v. Wilcocks, 2 Johns. 1; Kent v. Welch, 7 Johns. 258.)

IV. The act of the Legislature authorizing Adeline Whittley to make a deed was constitutional and valid. There was no retrospective feature in it whatsoever, unless it was in the recitals—certainly none in the enactment. In the case of Routsong v. Wolf, (35 Mo. 174,) there were two acts of Assembly involved. One undertook to legalize a deed previously executed which was void when made; the other authorized an infant to make a deed *in futuro*. The court held that the former act was retrospective and void, but did not so decide as to the latter.

Clover, for respondent.

I. Part payment of the purchase money, and taking possession of the land contracted for, are now always to be deemed part performance of a contract sufficient to take a case out of the statute to prevent frauds and perjuries. (Sto. Eq. Ju. §§ 759-64, &c., *passim*.)

II. Time is not any essence of the contract in this case.

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If a party comes *recenti facto* to ask for a specific performance, the suit is treated with favor by a court of equity. (Sto. Eq. Ju. *ubi supra.*)

III. In the case at bar, there has been no change of circumstances affecting the character or justice of the contract, which could give defendant cause to complain against the specific performance of a contract sought for by himself, by which he is morally as well as legally bound, and which he has enjoyed the fruit of.

WAGNER, Judge, delivered the opinion of the court.

When this case was before this court on a previous occasion, (31 Mo. 54,) it was decided that an agreement to convey land by general warranty, amounted to an engagement that the party so conveying has or will have an indefeasible title. That a vendor cannot have a specific performance of a contract without showing that he has a good title to the land he has bargained to sell. The objection that formerly arose seems to have been obviated, and a good title was tendered at the last trial. And a specific performance will be decreed, though the title was not perfect when the bill was filed, if it appear that it can be perfected before the judgment or decree. If any injury has resulted, it will be compensated by charging the complainant with interest. (Clute v. Robinson, 2 Johns. 595; Pierce v. Nichols, 1 Paige, 244; Brown v. Huff, 5 Paige, 235; Viele v. Troy & B. R.R., 20 N. Y. 184.)

But the great difficulty in this case is the plea of the statute of frauds. The plaintiff gave a written receipt, which was sufficient to take the case out of the statute as far as he was concerned; but as to the defendant, the contract was entirely verbal.

It is the constant practice in courts of chancery to compel a specific performance by the vendor of a contract for the sale of lands, subscribed by him, although the purchaser has not bound himself by subscribing the contract. Bills for specific performance are supported in such cases, both be-

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cause the statute of frauds only requires the contract to be signed by the party to be charged, and because the plaintiff, by the act of filing the bill, makes the contract mutual, and it is optional with a party who has made a parol contract to convey land to avail himself of the plea of the statute or not. (*McGowen v. West*, 7 Mo. 570; *Farrar v. Patton*, 20 Mo. 81; *Ivory v. Murphy*, 36 Mo. 534; *Worrall v. Munn*, 1 Seld. 229; 4 Russ. 298; 1 Russ. & Myl. 391; 7 Ves. 265; 1 Edw. Ch. 5; 2 Jac. & Walk. 426.)

The defendant denies the contract as set forth in plaintiff's petition, and alleges a different contract, and in addition thereto pleads the statute of frauds.

Where a bill for a specific performance of a parol agreement was filed, the only witness for the plaintiff proved an agreement different from that stated in the bill, and defendants in their answer stated a different agreement, and Lord Eldon decreed specific performance, according to the answer. (*Mortimer v. Archer*, 2 Ves. 243.) But the statute of frauds was not pleaded, nor relied on by the defendants. Formerly, specific performance was decreed where the parol agreement was confessed in the answer, although the statute of frauds was insisted on as a defence. (*Child v. Godolphin*, 1 Dick. 39.) But this doctrine may now be considered as entirely overruled, and the doctrine firmly established, that even when the answer confesses the parol agreement, if it insists, by way of defence, upon the protection of the statute, the defence must prevail as a competent bar. (2 Sto. Eq. Ju. § 757; R. C. 1855, p. 1238, § 47.) And this doctrine is only carrying out, and executing the statute; for it is impossible to see how a party can be bound by a contract which the statute declares void, when he insists upon it as a defence, and declines to waive his rights under it.

We are at a loss to determine on what grounds the defendant asks for compensation for his improvements, when he denies that they were made under a valid or binding contract, and shields himself behind the statute of frauds. He asks this court to stretch forth its strong arm of equity inter-

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position to protect him, and at the same time divests it of its jurisdiction, by setting up a defence which, if valid, precludes all equitable relief. We have not been able to find the slightest authority in any elementary treatise, or single case in any of the reports, which countenances the idea that a vendor can have specific performance against the purchaser on the ground that he has been placed in possession of the purchased premises, and paid part of the purchase money, when he sets up as a bar the statute of frauds. Courts frequently decree specific performance in favor of a vendee, when he has been placed in possession, paid part of the purchase money, and made valuable improvements, on the ground that to withhold relief under such circumstances would make him the victim of fraud, as he could not be restored to his former condition, and would have no adequate remedy at law. But this doctrine of part performance does not apply to the vendor.

The law was well summed up by Judge Scott in this very case: "We do not see how the plaintiff can meet the plea of the statute by insisting that the defendant has been put in possession, made payment of part of the purchase money, and erected valuable improvements. These circumstances might be insisted on by the purchaser on a bill for specific performance, when the statute was pleaded by the vendor; but if the vendee will waive the right these circumstances conferred on him, we do not see how the vendor can insist on them for him."

The defendant availing himself of the statute of frauds, the parties must be left to their remedy at law.

The judgment is reversed, and the suit dismissed. Judge Holmes concurs; Judge Lovelace absent.

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**THE PRESIDENT AND DIRECTORS OF THE BANK OF LOUISVILLE,
Plaintiffs in Error, v. JOHN YOUNG, Defendant in Error.**

1. *Illegal Banking—Notes.*—A note given to secure a loan made in foreign bank notes by a foreign corporation doing business by its agent in this State, is void, and notes given in renewal of such original note are also void.
2. *Conflict of Laws—Interest.*—A corporation, created by the laws of another State, although forbidden by its charter to take more than six per centum interest, may, upon loans made in this State, charge the rate of interest allowed by our laws. The law of the place where the contract is to be performed will govern the rate of interest. One State will not enforce the usury laws of another State, in respect to contracts made within its own limits.

Error to St. Louis Court of Common Pleas.

Whittelsey, for plaintiff in error.

I. The first instruction given for the defendant was erroneous, because not warranted by the evidence, nor by the statute. The evidence showed that Campbell, the president of the bank, was on a visit to St. Louis, and made a loan to Conant, and took his note, endorsed by George Pegram. This was the only loan proven ever to have been made in this State by the bank, and Campbell had no office or place of business in this State.

The words of the statute (R. C. 1855, p. 289, § 14) are: "Bonds, &c., given for money lent or advanced by a foreign corporation, situated or located, or which is doing business by its officers or agents, within this State, &c., shall be void." These words evidently require that something more should be shown than one single transaction. It is the "doing business" which is forbidden; section 11, forbidding any foreign bank from keeping any office of discount, &c., shows this to be the intent of the statute. (See also §§ 7 & 13.) Section 13 makes every day's keeping open an office a distinct offence. (Sackett's Harb. Bk. v. Lewis Co. Bk., 11 Barb. S. C. 213; Bates v. State Bk., 2 Ala. 465-75; Potter v. Bk. of Ithaca, 5 Hill, 490, S. C. on appeal; 7 Hill, 530; Suy-

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dam v. Morris C. & B. Co., 6 Hill, 217; City Bank v. Beach, 1 Blatch. C. C. 425; Pennington v. Townsend, 7 Wend. 276; 25 Wend. 648; Ang. Corp. § 264, 274.)

II. Although the original note may have been void, so that no recovery could have been had upon it, yet the plaintiff could have recovered the value of the thing lent, and a new note having been given, the new consideration supported the new note, and the plaintiff is entitled to recover. Note the different wording of §§ 6 & 14. (Armstrong v. Toler, 11 Wheat. 258; Chit. Cont. 40-1; Barjean v. Walmsley, 2 Strange, 1249; Robinson v. Bland, 2 Burr, 1077, 1080, 1082.) These last two cases cited and approved, Utica Ins. Co. v. Scott, 19 Johns. 1-7; 5 Barb. S. C. 9; 3 Ed. Ch. R. 395.

III. The second instruction was erroneous. The interest taken having been legal by the law of this State, where the contract was made and to be performed, the contract was valid.

a. The *lex loci* governs the contract. (Broadhead v. Noyes, 9 Mo. 96; Andrews v. Pond, 13 Pet. 65; De Wolf v. Johnson, 10 Wheat. 367, 383; Sto. Bills, § 148; Sto. Conf. L. §§ 243, 296; Hosford v. Nicols, 1 Paige, 220.)

b. The limitation in the charter upon the rate of interest is confined to notes negotiable and payable at the bank. (Charter, § 12.) It may do a general banking business, deal in bills, &c. (§ 2.)

c. It was not forbidden by its charter from purchasing notes or making loans in other States, and not being forbidden, it could thus deal and lend. (Ang. Corp. § 273; Blair v. Perpetual Ins. Co. 10 Mo. 559; Bk. of Augusta v. Earle, 13 Pet. 321.)

d. The provision in the charter, limiting interest to six per cent., was but prescribing the general statute as the rule for the bank, and did not prevent it from taking for a loan in another State the interest legal by the law of that State. The charter merely required the bank to observe the law. (Bard v. Poole, 2 Kern., N. Y., 595; City Sav. Bk. v. Bidwell, 29 Barb. 325; Knox v. Bank U. S., 26 Miss. 655; 6

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Conn. 420; 3 Cow. 684; Bailey v. Murphy, Walk. Ch. 424.) It must be observed that the law of Kentucky does not avoid a contract for usury.

e. The violation of its charter by plaintiff cannot be taken advantage of collaterally. (Bk. of Mo. v. Merchants' Bk., 10 Mo. 132; Farmers' Bk. v. Garten, 34 Mo. 119; Fleckner v. Bk. U. S., 8 Wheat. 457.)

Glover & Sheyley, for defendant in error.

I. The note sued on in this cause was absolutely null and void. The transaction in its inception was null and void. The loan was made in violation of § 14 of "An act to prevent illegal banking, and the circulation of depreciated paper currency within this State," approved December 8, 1855. (1 R. C. 1855, p. 289, § 14.) A fraud upon a statute is a violation of a statute. (2 Pet. 527, 536.) A foreign corporation of New Jersey doing business in New York contrary to a statute of New York, was held not entitled to recover on the prohibited contract. (7 Wend. 276; 22 Me. 491; 11 Wheat. 258; 3 McLean, 103; 2 Doug. 155; 1 Doug. 401; 14 Mass. 322.)

II. The plaintiff, by the law of its existence, could not take a higher rate of interest than one per cent. for sixty days, including days of grace; and if it did so, the whole contract for interest was made void, and payments thereon might be recovered back by the person paying the same. The bank charter forbids a greater rate of interest than six per cent. per annum. (Laws of Ky.)

We contend that this law of the corporation of the plaintiff in this suit is binding on it in Missouri as well as in Kentucky. It may be that individuals may make any contract in any State which the laws of such State allow. But this is not the case with corporations; they can derive no new powers beyond those granted at home; they are restricted everywhere by the laws of their being. (8 Ohio, 286; 11 Ohio, 489.) In Ang. & Ames on Corporations, 234, it is said in deciding whether a corporation can make a particu-

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lar contract, we consider first whether its charter, or some statute binding on it, forbids or permits it. (4 Pet. 152, 168.)

III. As corporations are the mere creatures of the law, and derive all their powers from the laws creating them, it is perfectly just and proper they should be obliged to show their authority for the business they assume. (2 Kent, 299, 5th ed.; 2 Pet. 527; 2 Doug. 259; 3 McLeon, 103, 267.)

A corporation enjoys such special privileges or franchises as the laws give to it, and no other.

IV. The bank being prohibited from charging more than one per cent. for sixty days, including days of grace, and having wilfully violated the law of its charter in that behalf, the whole contract was null and void from the beginning. A corporation can do no valid act which its charter prohibits. (2 Pet. 527.) The violation of charter defeats the action on the note. (1 Hall, N. Y., 480; 5 Conn. 560; 3 Eng. Com. Law, 215; 7 Wend. 276, 34; 7 Mo. 586; 26 Barb. Sup. Ct. 596; 7 N. Y., 3 Selden, 328; 3 Comst., 3 N. Y., 19, 34; 8 Ohio, 286; 4 Wheat. 636; 2 Doug., Mich., 251.)

The charter provided that the bank might take six per cent. and no more; the bank contracted for more; and though no provision of the law declared the note void, it was so held to be. (11 Wheat. 271; 2 Doug., Mich., 254.) It is laid down that though the contract was to be performed in New York, it was to be controlled by the laws of Indiana chartering the bank. (11 Wheat. 271; 11 Ohio, 489.)

It is a good defence to any action by a corporation that the contract is not authorized by its charter. (21 Mo. 92.)

A corporation and an individual do not stand on the same footing in regard to the right of contracting. The latter may make any contract not inconsistent with the interests of society, whilst the former must look to the powers given in the charter. (10 Mo. 565.)

WAGNER, Judge, delivered the opinion of the court.

The record in this case shows that in 1857, one Campbell, who was president of the Bank of Louisville, Kentucky, a

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foreign corporation, came into this State as agent of the bank, and brought with him a large amount of foreign bank notes, for the purpose of using the same in buying and selling bills of exchange, checks and drafts, and discounting bills and notes, and loaning the same in this State; and that a large portion of the notes so brought were issued by him and circulated in this State. That H. A. Conant & Co. applied to said Campbell, in the city of St. Louis, for a loan for \$5,000, and the loan was made upon the note of Conant & Co., endorsed by George Pegram and the defendant, which note was discounted, and \$4,842 paid to Conant & Co., in Kentucky bank notes, then at a discount of one per cent. The loan was made by agreement at ten per cent. per annum, but the rate of interest actually charged, it is contended, was greater. There were various renewals of this note, by bills of exchange and notes, and partial payments made on each renewal, when finally Conant & Co. made a new note for the balance remaining due, endorsed by the defendant alone, before the maturity of which Conant & Co. failed. But, subsequently, renewals were still made, at the request and on the endorsement of defendant; and at last, to close the matter, he took up the note of Conant & Co., and gave his note in its stead, which is the note here sued on. It furthermore appears that the Perpetual Insurance Company of St. Louis was the collecting agent and correspondent of the plaintiff, both prior and subsequent to the loan to Conant & Co. Large quantities of foreign bank paper were deposited with the secretary of the insurance company, who paid it out under instructions from plaintiff, the usual course being to have the paper of applicants for loans passed on at plaintiff's place of business in Kentucky, and then remitted here, with directions to pay out certain specific amounts. But the paper in this case was discounted here, and renewed on divers occasions at the office of the agent.

The charter granted the plaintiff by the Legislature of Kentucky, was set up in defence, by which it is declared, in § 12, "that said bank should not contract for or receive a

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greater interest than at the rate of six per cent. per annum, for the loan or forbearance of money ; and interest on promissory notes, negotiable and payable at said bank, and there discounted, shall be calculated on the true time such notes have to run, including three days' grace," &c.

The laws of the State of Kentucky were also given in evidence, by which it was provided that all contracts and assurances made directly or indirectly for the loan or forbearance of money, or other things, at a greater rate than legal interest (six per cent.), shall be void for the excess over the legal interest ; and in case of banks or corporations, if a greater discount is taken, the whole contract for interest shall be void, and anything paid thereon as interest may be recovered back by the person paying the same, or any creditor of his may recover the same by bill in equity.

At the conclusion of the testimony, plaintiff asked the court to declare the law to be that if the defendant gave the note sued upon, then he had not, in his answer nor by the evidence, presented any defence against the note, and the plaintiff was entitled to recover ; which declaration the court refused to give.

The court then, at the request of the defendant, gave the following instructions :

1. If the jury believe from the evidence that the plaintiffs are a corporation of Kentucky, and that, in 1857, plaintiffs, by an agent doing business for them in this State, loaned H. A. Conant & Co. \$5,000, more or less, of bank notes issued by plaintiff, or any foreign corporation, and Conant & Co. gave plaintiff their bill or note, endorsed by defendant, for such loan ; and if the jury further find that the bill or note originally given has been reduced by payments from time to time, with renewals of the paper and extension of the time thereon, and that the note now sued on is a renewal of the original paper, so given by Conant & Co., and was made to secure a balance of said original loan, the note now sued on is null and void, and the plaintiff cannot recover.

2. If the note sued on was given mediately and remotely

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in renewal in part of a loan of \$5,000, made by the plaintiff to Horace A. Conant, for which said Conant gave his note with the defendant and another as endorsers; and if, in making said loan, the plaintiff contracted for and received a greater rate of interest than at the rate of six per cent. per annum, then plaintiff cannot recover in this action.

Plaintiff then took a non-suit, and, failing to have the same set aside, brings the case here by writ of error.

The instruction or declaration of law asked by the plaintiff was, we think, rightly refused. It was virtually declaring by the court that there was no evidence adduced by the defendant constituting a defence. This was not warranted by the facts in the case. It is urged in argument that the first instruction given for defendant was not justified by the evidence.

The instruction is predicated on the fact that the plaintiff, in making the contract of loan and the various renewals, had violated the law in regard to illegal banking and the circulation of depreciated paper currency. (R. C. 1855, p. 285.) It is provided by § 14 of the act to prevent illegal banking, that "all bonds, bills or notes, or other instruments of writing, securing the payment of any money or bank notes, loaned or advanced by any foreign corporation or unincorporated banking company, situated or located, or which is doing business by its officers or agents within this State, to such foreign corporation or unincorporated banking company, or execute to any agent, or person holding himself out as agent of such corporation or unincorporated banking company, or to any corporation or person, whether such bond, bill or note, or other instrument of writing, be made payable, or made to secure the payment of such loan of money or bank notes to such foreign corporation or unincorporated banking company, or to the agent thereof, for the use of the same, or such agent, or any other person or corporation, either directly or indirectly, for the use of such foreign corporation or unincorporated banking company, in whatever name or form the same may be drawn, shall be taken and held as utterly void and of no effect."

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The obvious intention of the act was to exclude certain associations of persons, foreign corporations, from coming in competition with the authorized banking establishments of this State, and to prevent their circulating depreciated currency. And, with this view, it makes utterly void all bonds, bills or notes, or other instruments of writing, securing the payment of any money or bank notes loaned or advanced by any foreign corporation or unincorporated banking company, situated or located, or which is doing business by its officers or agents, within this State.

A foreign corporation, doing the prohibited business through its agent, comes within the penalty of the law. There was evidence direct that the plaintiff made the loan out of which this suit originated, through its duly authorized and accredited agent for that purpose ; that he brought with him a large amount of depreciated currency, mostly the issue of the plaintiff, and discounted and circulated it in this State. And further, that the note to Conant & Co. was renewed at different times, and the time extended, and payment made thereon, to the other agents of the plaintiff, who were doing business in its behalf in the city of St. Louis after the departure of Campbell. Whether there were facts sufficient to constitute a violation of law, was a question for the jury to find. But it is insisted there is no evidence of more than one transaction of loan by the plaintiff in this State, and that that is insufficient ; but this conclusion is usurping the province of the jury, and rejecting entirely all the evidence in relation to the renewals and payments made with the secretary of the insurance company. It was for the jury to determine, as matter of fact, whether the renewals, extensions of time, and payments, were contracts or transactions made for the purpose of securing the payment of money loaned or advanced by plaintiff, through its agent, and whether so done directly or indirectly is wholly immaterial. If the manner of doing the business was a cunningly devised scheme to evade the statute, the law will neither sanction nor tolerate it. An attempt by indirect and fraudulent means to elude

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the provisions of a statute will be construed as a violation of it.

The note in controversy grew immediately out of the original loan to Conant & Co., and, if that was void and illegal, and incapable of enforcement by reason of being in violation of law, the note cannot give the plaintiff any greater or superior right to recover than if suit had been brought on the first loan. No new consideration was given to support and uphold this note, other than was given to sustain the loan to Conant. The case of *Armstrong v. Toler* (11 Wheat. 253), which entirely harmonizes with a great number of cases, both English and American, is not an authority for the doctrine contended for by plaintiff's counsel. Had Pegram, who was endorser on the first paper with defendant, at defendant's request, paid off the whole amount and received defendant's note for one half, being his contributory share, it is very evident no defence could have been made to the note by defendant, for it would have been founded on a sufficient consideration within the principle laid down in the books. But such is not this case. We are of the opinion, therefore, that the first instruction enunciated a correct principle of law, and was rightly given.

The next point is whether, if the plaintiff, in making the contract by agreement, received a greater rate of interest than six per cent. per annum, the whole contract is void. It is very true there is a distinction between corporations and natural persons ; whilst the latter may make any contract not prohibited by the law, or inconsistent with the interests of society, the former can exercise no powers except such as are specifically conferred on them by their charters.

The Supreme Court of the United States has said : "The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." (*Beatty v. Knowles*, 4 Pet. 152.) A corporation is limited in its faculties to the transaction of the business expressed in the act of incorporation, and if it proceed to make contracts or, engage in busi-

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ness forbidden by the act, the contracts so made, and all the securities which it may take for their enforcement, will be held totally void and of no effect. (*Tallmadge v. Pell*, 3 Seld. 328; *Beal v. Fulton Bk.*, 3 Wend. 582; *Bk. of the U. S. v. Owens*, 2 Pet 527.) In the act of the Kentucky Legislature incorporating plaintiff, power is expressly given to loan money, deal in bills of exchange, checks and promissory notes, and to discount, upon banking principles and usages, bills of exchange, post notes, promissory notes, and other negotiable paper, for the payment of a sum of money certain. By the law of Kentucky, corporations and individuals alike are both forbidden to take a higher rate of interest than six per cent. per annum; but there is nothing in the act chartering the plaintiff tending to show that it was intended to place it on a different footing from individuals in regard to extra-territorial contracts.

The law of the place where contracts are made and to be performed must govern. We will not attempt to execute the usury laws of Kentucky in respect to contracts made here.

The rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed; where interest is expressly or impliedly to be paid. A contract for loan, made payable in a foreign country, may stipulate for interest higher than that allowed at home; and if the contract be illegal there, it will be illegal everywhere. But if it be legal where it is made, it will be of universal obligation, even in places where a lower interest is prescribed by law. (*Sto. Bills of Ex.* § 148.)

The charter obliges the plaintiff to observe the laws of Kentucky regarding interest as to loans and contracts made within the jurisdiction of that State; but it is not required to comply with the laws of that State on the subject of the rate of interest in making contracts in other States, and which are there to be performed. As to these latter contracts the *lex loci contractus* governs. (*Bard v. Poole*, 12 N.

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Y. 495; Frazier v. Wilcox, 4 Rob., La., 517; Knox v. Bk. U. S., 26 Miss. 655.)

The second instruction, then, given by the court was erroneous, and for this the judgment will be reversed and the case remanded. The other judges concur.

CITY OF CARONDELET, Appellant, v. JOHN SIMON et al., Respondents.

Limitations — Adverse Possession. — A party entering into possession of land under claim of title, and exercising the usual acts of ownership over the whole tract described in the deeds under which he claims, for the period prescribed by the statute, thereby defeats the superior title by virtue of his adverse possession.

Appeal from St. Louis Land Court.

This was an action of ejectment against Simon to recover possession of lots 179, 180 and 181 in the common of Carondelet south of the river Des Pères. Davis appeared as landlord of defendant, and filed an answer denying the title of plaintiff and the unlawful withholding possession of the premises, and set up title in himself by virtue of adverse possession of so much of said lands as were within the Martigny survey.

To show title, plaintiff read 1st, the "Act to incorporate the City of Carondelet," approved January 16, 1860; 2d, U. S. survey of commons of Carondelet; 3d, the subdivision of commons into lots made in 1837. This was the plaintiff's case.

Defendant read in evidence, 1st, the confirmation to J. B. Martigny's legal representatives of a tract of 12×40 arpens, confirmed by act of July 4, 1836; 2d, U. S. survey 3119 of said confirmation; 3d, the incorporation of Carondelet by the county court, August 20, 1832.

It was agreed that on October 8, 1842, James Davis had

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acquired title to six-ninths of the Martigny title, and that in 1847 Samuel Forder had acquired three-ninths of the Martigny title and the land included in the survey No. 3119, and that, in a partition between Forder and the heirs of James Davis, the western part of the Martigny claim—which includes the premises sued for—had been set off to Davis.

The defendant then proved a possession of the Martigny tract by James Davis, under his title from 1842; that he died on the tract August 30, 1844, and that since that time his heirs had been in actual possession of the western part of the tract, exercising the usual acts of ownership over the whole tract, and that in 1847 Forder entered upon the eastern part of the tract, enclosing and cultivating it, and that the defendants had no possession outside of the Martigny survey.

At the request of plaintiff, the court instructed the jury to the effect that the plaintiff had the better legal title, and was entitled to recover, unless the defendants had been in the actual adverse possession for the whole period of ten years prior to the commencement of the suit.

Of its own motion, the court gave the following instruction: "If the jury believe from the evidence that the defendants entered into and upon the Martigny claim, and fenced in and actually occupied and cultivated a part thereof for more than ten years before the commencement of this suit, and during the whole of that time exercised such acts of ownership over the whole tract covered by the Martigny survey as would signify an intention to hold the same against every person, then the jury will find for the defendants as to all the land within the Martigny claim."

At request of defendants, the court instructed the jury: "If the jury believe from the evidence that the defendants, and those under whom they claim, have been in possession of so much of the premises sued for as lie within the Martigny survey, claiming title thereto under the deeds and records read in evidence, and that said possession has been

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actual, open, and notorious; under said claim, for more than ten years prior to the commencement of this suit, they will find for the defendants."

To which two instructions plaintiff excepted.

Casselberry, for appellant.

By an examination of the record, and the plats accompanying the same, it will be seen that the plaintiff has sued for 120 arpens of land within the common of Carondelet; that the defendants claim under a confirmation of John B. Martigny, by the act of Congress of July 4, 1836. At the conclusion of the survey No. 3119, for John B. Martigny, the Surveyor General expressly says that the whole of the Martigny tract is within the common of Carondelet.

The confirmation to Martigny being twenty-four years younger than the confirmation of the common, the defendants cannot deny the superiority of the title of the plaintiff, who holds under the confirmation of the commons.

It will be seen from the evidence that not exceeding thirty acres at farthest, if that much, was in actual possession ten years next before the time of the commencement of this suit. It is a well established rule of law—

1. That although, as a general principle, a person in actual possession of a part, under written color of title, is deemed in possession of the whole, yet this rule does not apply as against the real owner, who is also in possession of a part, claiming the whole. The only adverse possession as against him, is actual possession. (*Cottle v. Snyder*, 10 Mo. 764; 4 Serg. & R. 465.)

2. Where there are two tracts of land, and the one interferes with or laps on the other, the statute of limitations has no operation against him who has the best right, unless he who has the inferior right takes an actual, adverse, exclusive possession. (*Griffith v. Schwenderman*, 27 Mo. 412; Ang. Lim. 432.) In such cases, the rule that possession of part is possession of the whole does not apply.

Ang. on Lim. 425, says—"Occasional exercise of domin-

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ion by broken and unconnected acts of ownership over property which may be permanently productive, is considered as in no respect calculated to assert to the world a claim of right, for such conduct bespeaks rather the fitful invasions of a conscious trespasser than the confident claim of a rightful owner." The second and third instructions were therefore erroneous; there was no evidence on which to base them.

The defendant offered no evidence to define the boundaries of the land; and they allege they were in possession ten years before this suit was brought. In relation to defining the boundaries of the land alleged to have been in possession of the defendant a sufficient time to bar the suit, Ang. on Lim. 416, says—"It is incumbent on the person claiming land by virtue of possession, to show an actual occupation and appropriation of what he so claims within some defined boundaries." (1 Johns. 156; 10 Johns. 477, and the other authorities therein referred to; Ang. Lim. 417.)

In addition to the above, we would further remark, that the survey of the Martigny tract, No. 3119, read in evidence by the defendants, shows that the survey was not recorded and approved by the Surveyor General till March 5, 1858, which is not ten years ago. As the boundaries of the Martigny tract were indefinite, the title attached to no land till the survey was made. (Massey v. Menard's heirs, 8 How. 293; West v. Cochran, 17 How. 403; Stanford v. Taylor, 18 How. 411; Lafayette's heirs v. Kenton et al. 18 How. 197; Carondelet v. St. Louis, 1 Black. 179; Magwire v. Tyler, 1 Black. 195.)

As the title did not attach till 1858, whatever title the defendants may claim remained in the United States until the survey to Martigny in 1858, which is not ten years ago.

Whittelsey, for respondents.

I. Where a party enters into possession of lands under deeds which give him a claim of title, his possession will extend to the limits of the tract described by his deeds, unless

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the party having the superior title be also in the actual occupation of part of the land belonging to him.

In this case, the plaintiff never had any actual possession of any portion of the premises, or of the commons. (Aug. Lim. §§ 400-402; Johnson v. Prewitt, 33 Mo. 533; Shultz v. Lindell, 30 Mo. 310; Tayon v. Ladew, 33 Mo. 205.) But in this case the court went further, and required the defendants to show the usual acts of ownership and possession over the whole tract, the Martigny survey, and in accordance with § 5 of act of Feb. 2, 1857. The jury have found the fact for the defendants. It was the intent of that section to provide for cases of prescription by parties entering without color of title, so that they might prescribe for land beyond their actual enclosure, which was not necessary when the entry was under color of title. But in this case the defendants entered, under a claim of title, a confirmation by the United States; and their actual occupation of part, claiming title, was an adverse possession of the whole tract, without proof of acts of possession over the whole tract.

II. The plaintiff showed that in 1837 or 1838 the common was divided into lots, some 190 in number. The whole common embraced some ten thousand acres. The possession of some of these lots by tenants of plaintiff could not give the plaintiff presumptive possession of any of the lots sued for as against the actual possession of the defendants. The plaintiff does not bring itself within the rule laid down in Cottle v. Snyder, 10 Mo. 764; the plaintiff had no actual possession.

This is not the case of overlapping claims, in which the presumptive possession of the legal title overcomes the presumptive possession of actual possession of part, under claim to the whole tract described in the deed, but not having actual possession of any part of the lap.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff claimed title to the land in controversy as a part of the common of the town of Carondelet. The defend-

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ants claimed title under a confirmation and survey of the Martigny tract, under the act of Congress of the 4th of July, 1836, and gave evidence of an actual adverse possession of the land in controversy for more than ten years next before the commencement of this suit. The evidence appears to have fully established the defence.

The instructions which were given on behalf of the defendants appear to be unobjectionable. The plaintiff's instructions were also given. No instruction was refused. The jury found a verdict for the defendants. The verdict was well supported by both law and evidence. The plaintiff has failed to point out any particular error, and we are at a loss to conjecture on what ground an appeal was taken.

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

Opinion of Court on re-hearing.

HOLMES, Judge. A re-hearing was granted in this case, at the last term, in order to allow the appellant an opportunity to be heard. No reason has been shown for changing the opinion heretofore given in the cause; and for the reasons therein stated the judgment will be affirmed. The other judges concur.

ALEXANDER J. P. GARESCHÉ, EXECUTOR OF VICTOIRE LABADIE, Respondent, *v.* PIERRE CHOUTEAU, JR., *et als.*, Appellants.

1. *Bonds and Notes—Assignor.*—A note payable in this State to A., or order, although not expressed to be for value received, imports a valuable consideration as between maker and payee, and as between payee and assignee. In a suit by the assignee against the assignor, the amount specified in the note is *prima facie* the amount for which the assignee is liable. Under our law there are three classes of notes: 1. Notes negotiable like inland bills of exchange, containing the words, "for value received, negotiable and payable, without defalcation"; 2. Notes payable to order, or bearer, or assigns, under the first section of the act relating to bonds, notes, &c. (R. C. 1855,

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p. 319); 3. Notes not drawn payable to order, or bearer, and containing no words of negotiability that can make them assignable under the statutes or otherwise than in equity.

2. *Witness—Assignor—Evidence.*—The assignor of a note is not a competent witness as to facts occurring anterior to the assignment, and his conversations with a witness in the absence of the plaintiff are merely heresay, and are inadmissible in evidence.
3. *Conflict of Laws—Lex Loci.*—A note although made in another State, yet payable in this State, is to be governed by the laws of this State.

Appeal from St. Louis Circuit Court.

The plaintiff sued the defendants, as assignors of a note, as follows:

\$3,150.

OQUAKA, ILL., October 13, 1859.

One year after date, I promise to pay to the order of P. Chouteau, Jr., & Co., at their office in St. Louis, Mo., thirty-one hundred and fifty dollars, value received.

S. S. PHELPS.

[Endorsed.] Pay to the order of Alexander J. P. Garsché, executor of Victoire Labadie, deceased.

P. CHOUTEAU, JR., & CO., by Wm. Moffitt.

Victoire Labadie's Ex'r, 17 Oct. '60, one hundred and fifty dollars on account.

Protest waived.

P. CHOUTEAU, JR., & CO.,

by Wm. Moffitt.

The petition set out these facts, and also that Phelps was not a resident of, nor did he reside in this State.

The answer of the defendants was substantially as follows: That the note sued on was always the property of Victoire Labadie, in her lifetime, and belonged to her executor on her death; that said note was made payable to P. Chouteau, Jr., & Co. by mistake, or oversight; as soon as the error was discovered, the defendants corrected the same at the instance and request of plaintiff, by endorsing said note in blank, and transferring the legal title to plaintiff to facilitate the collection thereof. The defendants received no consideration for endorsing said note. Defendants never claimed any interest in said note, and passed the same to plaintiff without recourse; that if "without recourse" is not expressed in the endorse-

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ment, it was left out by mistake; they pray the court to correct the mistake.

It was admitted by the pleadings that when said note fell due, the maker Phelps was non-resident of the State of Missouri, and ever since so continued to be.

The defendants introduced as a witness one Isaacs, who, on his examination in chief, testified that the note was always Mrs. Labadie's and was assigned to the plaintiff merely to enable him to collect it. On his cross-examination, however, he testified that he knew nothing about it; that he was not in the country till long after the making of the note and the transactions between Mrs. Labadie and P. Chouteau, Jr., & Co. He admitted that when the note was assigned to Garesché, that Garesché refused to receive it if endorsed "without recourse," and would not receive it unless fully endorsed by P. Chouteau, Jr., & Co., so as to give him his recourse upon them according to law, and it was after the refusal that the assignment was made to Garesché by P. Chouteau, Jr., & Co.

The court, on motion of the plaintiff, gave the following instructions, viz :

1. The plaintiff moves the court to decide the law to be that if the defendants Pierre Chouteau, Jr., & Co. held the note in suit in their own right, and assigned the same to the plaintiff, and at the time when said note was so assigned, and ever since, the maker Phelps was a non-resident of the State, the plaintiff is entitled to recover.

2. That the legal presumption arising on the face of the note is, that Pierre Chouteau, Jr., & Co. held said note in their own right; and the legal presumption arising on the face of the assignment is, that the same was made for a consideration equal to the face of the note.

3. That said note being on its face payable in St. Louis, Mo., the said note is governed by the laws of Missouri, and is a non-negotiable note.

4. That there is no legal evidence in this cause that the

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note sued on was given in consideration of any money of Victoire Labadie, or that said note was ever her property.

To which the defendants excepted.

The court, on motion of the defendants, refused to instruct as follows :

"If the note in suit was the property of Victoire Labadie when it was originally made, and said Pierre Chouteau, Jr., & Co. were named as payees in the note by mistake or oversight, or only for the purpose of enabling them to collect the same for the benefit of said Victoire, and that the name of P. Chouteau, Jr., & Co. was afterwards endorsed on said note for the purpose only of transferring the legal title or legal interest in said note to the executor of said Victoire, then said P. Chouteau, Jr., & Co. did not by the fact of such endorsement become chargeable with the payment of said note as endorsers."

To which the defendants excepted.

The court gave judgment for plaintiff. The defendants in due time moved the court to grant a new trial, and filed their affidavit of newly discovered evidence, &c.

E. B. Ewing, Hill & Jewett, for appellants.

The court erred in not allowing the witness Isaacs to state all the circumstances attending the assignment. These were admissible as part of the *res gestæ*. (1 Greenl. Ev. §§ 108, 109, 111, 114.) This was clearly competent. (Hatch v. Dennis, 1 Fairf. 246 ; Kent v. Lowen, 1 Camp. 177.)

As to admissibility of defendants' declarations at time of assignment—Murray v. Oliver, 18 Mo. 406 ; 1 Greenl. Ev. §§ 190-91 ; Bay. Bills, 502-3, and notes ; Pocock v. Billings, 1 Ry. & M. 127.

Defendants also insist that the second instruction, the last clause of it, is also wrong, and should not have been given, as it is not law when applied to the endorsement of a note after it is over due, and the proof in this case was that the note was over due when it was endorsed. In all the cases

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where endorsement is presumed, the endorsement has always been made before the note was due; and in all the cases in this State, where the question of the liability of the endorser or assignor of a non-negotiable note has arisen, the endorsement has always been made before the note was due; so that in this State we have no decisions upon the liability of the endorser of a note after it is over due, which note is in form negotiable under the common law, but not so under our peculiar statute. Indeed, it is said by Parsons, (2 Pars. Notes, 13-14,) that it does not seem quite settled what is the obligation or contract of the endorser of a dishonored note. In one case, (Hunt v. Wodleigh, 26 Me. 271,) it was held to be equivalent to drawing a new bill at sight, and the endorser was entitled to demand and notice.

In this State it has been decided that the statute requiring diligence against the maker of a non-negotiable note, dispenses with the necessity of demand and notice, but this decision was made with reference to a note endorsed before it was due, and there is great reason for confining it to that class of paper, for it is only where the note is endorsed before it is due that any such contract can be presumed as that decision is based upon. But when the note is over due when it is endorsed, no such contract can be presumed.

The proof in this case was uncontradicted that there was no consideration for the endorsement, and that the note was over due when endorsed, and therefore the second instruction was wholly inapplicable to the case as made before the court.

But further, if the plaintiff should be entitled to anything in the case, he could only recover the amount of consideration paid for the note. This is the law even when the note is endorsed before it is due. (Smallwood v. Woods, 1 Bibb., Ky., 545; Spratt v. Kinny, 1 Bibb., Ky., 596; Smith v. Harley, 8 Mo. 560; 2 Bibb. 425; 1 Mar., Ky., 544; Blank v. O'Fallon, 1 Mo. 481.)

Our statute of 1835 and 1845 only made bonds and notes assignable, and said that the assignee of such may maintain

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a suit against the assignor only in one of the following cases, etc., etc. In the revision of 1855 "accounts" were put in, and the same provision is made to apply to the assignor of accounts.

It is insisted that this statute does not give the assignee any right of action which he did not have before against an assignor; that the whole law upon the subject, as to notes and bonds, plainly contemplates assignments made before they are due, as no case can be found in the books where the liability of an assignor after the bond or note was due has been discussed, and therefore that the assignee of a note over due is left to the law of contracts to enforce his right against the assignor; or that he must resort to the common law as to notes, and treat the assignment as a bill drawn by the assignor on the maker in favor of the assignee, according to the law as laid down in the case cited from the Maine Reports, and make demand on the maker, and notify the endorser or assignor.

Glover & Shepley, for respondent.

I. The note sued on being payable in St. Louis, is governed by the laws of the State of Missouri. (Edw. Bills, 167, 170-1; 8 Johns. 190; 2 Burr. 1077; 35 Barb. 182; Vinson v. Platt, 21 Geo. 135; Schofield v. Days, 20 Johns. 102.)

II. The note sued upon is not a negotiable note under the laws of the State of Missouri, and it being admitted that Phelps the maker was, at the making of the note, a non-resident of this State, and had so always continued to be, the liability of the endorsers P. Chouteau, Jr., & Co. became fixed.

The statute concerning bonds, notes and accounts, (R. C. 1855, p. 323, § 6,) provides that the assignee may maintain an action against the assignor when the maker is not a resident of, nor residing within, the State. Such have also been the decisions—Ivory v. Carlin, 30 Mo. 142; Muldrow v. Agnew, 11 Mo. 616.

III. Upon the transfer of a note, the legal presumption is that the assignor was the owner of the note in his own right,

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and that the transfer was for a valuable consideration equal to the face of the note. (Muldrum v. Agnew, 11 Mo. 616, and the cases there cited in plaintiff's brief; Stapp v. Anderson, 1 A. K. Marsh. 538; Allen v. Pryer, 3 A. K. Marsh. 305; 2 Wash. 219, 230, 232; 5 Ran. 377; 2 Bibb. 424; 5 Cranch, 332.)

The instruction does not pretend to lay down the rule as to the measure of damages between the assignor and the assignee, but simply says what, *prima facie*, the endorsement imports. It leaves the defendants to show that the real consideration was different from that which the assignment imports.

HOLMES, Judge, delivered the opinion of the court.

The note sued on was drawn payable to the order of the defendants, the payees, who endorsed it to the plaintiff. It was not expressed to be for value received, nor did it contain the words "negotiable and payable, without defalcation." The decision of the case depends upon the construction of the instructions which were given for the plaintiff. They are predicated upon the assumption that the note imported a valuable consideration, both as between the maker and payees, and as between the endorsee and endorsers. The question is whether this construction be correct under the statute concerning bonds, notes, and accounts. (R. C. 1855, p. 319.)

It is declared by this act that all notes in writing, payable to order or bearer, for any sum of money or property, though not expressed to be for value received, shall import a consideration, and be due and payable as therein mentioned. They are declared to be assignable in writing, or by endorsement, so that the assignee may maintain an action on them in his own name; but the assignee shall obtain no greater title or interest in them than the assignor himself had at the time, or before notice to the maker; and the maker may avail himself of any defence against the assignee that he could have made against the assignor. Protest and notice are dispensed

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with, and, in place thereof, the right of the assignee to sue the assignor is made to depend upon his using due diligence to sue the maker, unless he be insolvent, or a non-resident. Under the law merchant, notes were written promises to pay money ; and if they were made payable to order, or bearer, or assigns, they were negotiable ; that is, they contained words which made them assignable, transferable, or negotiable ; but if they did not contain such words, they could not be transferred or negotiated, so as to enable the assignee to sue in his own name, and they were non-negotiable notes. (3 Kent, 90 ; Sto. Prom. Notes, §§ 43-4.) Such negotiable notes implied value received without those words being inserted in them, and there arose, *prima facie*, a presumption of validity and of a valuable consideration, and the burden of proof was shifted upon the other side. An endorsement by the payee of such notes raised an implied contract that the endorser had a good title to the note, and that it would be paid by the maker, or if not, that the endorser would pay it himself, upon protest and notice ; that is, a valuable consideration was implied as between the endorser and the endorsee, as well as between the payee and the maker. (3 Kent, 108.) The statute dispenses with this implied warranty of good title, as well as with the protest and notice, and substitutes in place of it an implied warranty only of as good a title as the assignor himself had at the time of the assignment ; but there is nothing in the act which dispenses with the implied warranty or *prima facie* presumption of a valuable consideration, whether as between the assignor and the assignee, or as between the payee and the maker. It is expressly declared that such notes shall import a consideration, and be assignable in writing, or by endorsement, so that the assignee may maintain an action on them in his own name, either against the maker, or against the assignor. If a consideration were not to be implied, the contract on the face of the note would be *nudum pactum*, and no action could be maintained on it ; or, if he could aver and prove a specific consideration, as upon a mere contract, he would have no

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occasion to invoke the aid of the act; he could do that on the general principles of the law of contracts; and a construction which should require that, would render the assignability or negotiability created by the act next to useless, if not wholly nugatory.

Such notes contain words of assignability and negotiability in the sense of the law merchant, as well as in the sense of the statute. They create a privity of contract resting on the original consideration. Under the law merchant, notes containing no words of negotiability or assignability were for that reason non-negotiable, and the endorsement or assignment of them did not enable the endorsee or assignee to sue on them in his own name at law, though he might do so in equity. (Sto. Prom. Notes, § 128.)

In such case there was no privity of contract between the assignee and the parties antecedent to his immediate assignor; though even then, as between the payee and his immediate endorsee, the endorsement will ordinarily create the same liabilities and obligations on the part of the payee as in case of negotiable notes (Sto. Prom. Notes, § 128); and there are authorities which hold that, in such case, a consideration will be implied both at law and in equity. (Mackie's Ex'r v. Davies, 2 Wash. 219; Stapp v. Anderson, 1 A. K. Mar. 538; 3 A. K. Mar. 305; Biddle v. Mandeville, 5 Cranch, 332.)

In fact, under our laws, there are three classes of notes. The first consists of notes which are negotiable within the meaning of the act concerning bills of exchange. Being expressed to be for value received, negotiable and payable without defalcation, they are negotiable in like manner as inland bills of exchange.

The second class consists of notes which are drawn in accordance with the provisions of the act concerning bonds, notes and accounts, and which, as such, possess a qualified negotiability only. They are negotiable notes, under the restrictions and limitations of that act.

The third class may consist of notes which are utterly non-

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negotiable under either statute, or by the law merchant. This class will certainly include all such notes as are not drawn payable to order, or bearer, or assigns, and contain no words of negotiability that can make them assignable under the statutes, or otherwise than in equity.

The note in question here was not a non-negotiable note, but a negotiable note, having the qualified negotiability that is given to such notes by the statute; and, being such, a valuable consideration was implied in the endorsement of it, *prima facie*, as a presumption of law, between these parties, as well as between the maker and the payees. The burden of proof rested upon the defendants to rebut this presumption. In *Muldrow v. Agnew*, 11 Mo. 616, an instruction to this effect was said to be well enough; and in *Odell v. Presbury*, 13 Mo. 330, where the question was upon a note of the same kind, payable to order, the court expressed the opinion that "the blank endorsement of a note not negotiable under our statute [that is, the statute concerning bills of exchange, but negotiable in the sense of the act concerning bonds and notes] should be held to be *prima facie* equivalent to an assignment for value, subject to be filled up by any subsequent assignee."

We are not aware of any case which has given a different construction to this act. A consideration being implied by law, and the force of the statute, it was, of course, unnecessary for the plaintiff to aver and prove a specific consideration in order to sustain his cause of action. (*Bristol v. Warner*, 19 Conn. 7.)

A number of cases have been cited on the other side of the question, and among them the cases of *Whistler v. Bragg*, 31 Mo. 124, and *Elliott v. Thralkeld*, 16 B. Mon. 343; but these cases, so far as the reports show, were founded upon notes which contained no words which made them assignable, transferable, or negotiable. They were upon notes non-negotiable under the law merchant, as well as under the statutes; and the cases are not in point here. Such appears to have been the case in *Duncan v. Littell*, 2 Bibb. 242.

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The defendants excepted to the exclusion of certain conversations between the witness and one of the assignors, about endorsing the note, before it was done. The assignor of a note is not a competent witness to facts occurring anterior to the assignment, and his conversations with the witness in the absence of the plaintiff were mere hearsay at best. His statements might have been admissible against him, but certainly not in his favor. We think the testimony was properly excluded.

There was no basis in the evidence for the instruction which was asked by defendants, and it was rightly refused.

Upon the principles above established, the first three instructions given for the plaintiffs laid down the law correctly enough.

The fourth instruction was to the effect that there was no evidence in the case that the note sued on was given in consideration of any money of Victoire Labadie, or that said note was ever her property. This proposition is in general terms the converse of that propounded in the instruction which was refused for the defendants.

As applied to the issue on trial, it is not very clear what they mean. If it were, as it would seem, that there was no evidence which tended to prove that the consideration of the note was money of Mrs. Labadie, which she had entrusted the defendants to loan to a person selected by her; that she took the responsibility of the loan on herself; and that the note was drawn payable to the firm by mistake, when it should have been drawn payable directly to her; and that being so drawn, it was endorsed for the mere purpose of transferring the legal title, then, we think, the instruction was properly given, for the same reasons that the defendants' instruction was rightly refused. The evidence, so far as it showed anything, rather tended to prove that the firm had taken this note on their own responsibility; and if it were true, as the defendants seemed to contend, that they had loaned money on that note which belonged to Mrs. Labadie, without her knowledge or direction, and had the note drawn

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payable to themselves, a jury might very well be warranted in inferring that they intended to place themselves between her and the risk of loss, and that the true consideration for the endorsement was the money which Mrs. Labadie had already put into their hands. But it is not our province to discuss the evidence.

There was certainly no evidence to support the proposition contained in the instruction as therein stated. Upon the ground of newly discovered evidence, we do not think the case made was sufficient to warrant us in interfering with the discretion of the court below.

The burden of proof was on the defendants to rebut the *prima facie* case made by the plaintiff.

There is no error in the instructions; and the verdict being for the plaintiff on the facts, the judgment must be affirmed. The other judges concur.

JAMES AIREY, Respondent, *v.* JOHN M. PEARSON *et als.*,
Appellants.

Note—Endorser—Waiver of Protest.—An endorsement was made upon a negotiable note, before maturity, as follows: “I assign the within note to J. T. and hold myself responsible for the payment of the same; the said P. [maker] to have two years to pay the same, unless he prefers to pay sooner; interest on the same to be paid annually.” Held, that the endorsement was a waiver of demand and notice, and that the endorser was bound for the payment of the note, without any attempt to collect the amount due from the maker.

Appeal from St. Louis Circuit Court.

Napton, for appellants.

The Circuit Court construed the endorsement as an absolute promise, on the part of Hickman, to pay, at the end of two years, without demand and notice at the expiration of four months, or at the expiration of two years, and without any prosecution of a suit against Pearson, or proof that a suit would have been unavailing. In other words, the court held

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that Hickman was neither entitled to that demand and notice which as endorser of a negotiable note would be essential to hold him responsible, nor to that diligence which is exacted of a holder of a note not negotiable. His endorsement, under the view of that court, was an absolute obligation to pay Pearson's debt at the end of two years, if Pearson did not sooner pay it, without any demand, any suit, any notice, or any proof of insolvency.

The case of *Allen v. Rightmere*, 20 J. R. 365, decided by Judge Spencer, in a few lines, seems to be the only case which affords any countenance to such a construction of this endorsement, and that opinion is not approved by Judge Story in his able work on this subject. (Sto. Prom. N. 147, and note.) In that case, the endorser is treated not as incidentally or secondarily bound, but as primarily; and, of course, if he is so bound, he is not entitled to demand or notice.

The case of *Upham v. Prince*, 12 Mass. 14, a leading one on this subject, shows a very different view of the law from this New York decision. Judge Story says in relation to this case of *Upham v. Prince*, (Sto. Prom. N., note to § 147,) "this last decision seems to contain the true doctrine, and it is not easy to perceive what reasonable objection lies to it. The endorsement amounts, in legal effect, to an agreement to be bound for six months as endorser, and that a demand need not be made upon the maker of a note at an earlier period. It is therefore a mere waiver of the ordinary rule of law as to reasonable demand and notice upon notes payable on demand. (*Taylor v. Burney*, 7 Mass.)

Where the payee endorses and guarantees, he does not lose his character as endorser, but can convey title, as the recent cases hold, and as Judge Story concurs, and he ought only to be held to waive such demand and notice as he expressly or impliedly waives by the terms of his guaranty.

Lackland and Martin, for respondent.

I. The note made by Pearson was a negotiable promissory

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note. Hickman was the payee expressed in the body of the note, and therefore the only one who could become the first endorser of it. In placing his name on the back of the note, the liability of first endorser is the one which would primarily attach to his position; but it was competent for him, at the time of the transfer, to write over his name any other contract or obligation, or to qualify or limit or extend his obligation as endorser. This is what he has done.

II. The obligation of an endorser is to pay the note if it is not paid at maturity, provided the proper steps are taken by the holder, which consist of presentment and notice of non-payment. (Barclay v. Weaver, 19 Penn. 396.)

III. In the words written by Hickman above his endorsement will be found two distinct elements, either of which have always been held to constitute a waiver of demand and notice by an endorser.

1. He agrees that the time of payment shall be extended from four months to two years. (Ridgway et al. v. Day, 13 Penn. 208; Williams v. Brobsch, 10 Watts, 111; Amoskeag Bk. v. Moore, 37 N. H. 539.)

2. He agrees to hold himself responsible for the note. (Ridgway et al. v. Day, 13 Penn. 208; McDonald v. Bailey, 14 Me. 101; Blanchard v. Wood, 26 Me. 358; Bean v. Arnold, 16 Me. 251.)

It will be seen from the following authorities that a guaranty of payment is an absolute guaranty unlike any other, and that demand and notice are not required to make out a liability: Donley v. Camp, 22 Ala. 659; Allen v. Rightmere, 20 Johns. 365; Kitchell v. Burns, 24 Wend. 456; Hugh v. Gray, 19 Wend. 202; Williams v. Granger, 4 Day, 444; Clark v. Burdett, 2 Hall, 197; Manrow v. Durham, 3 Hill, 588; Liggett v. Raymond, 6 Hill, 641; Cobb v. Little, 2 Greenl., Me. 261; Brown v. Curtis, 2 Comst. 225.

HOLMES, Judge, delivered the opinion of the court.

The suit is on a promissory note, negotiable under the statute as an inland bill of exchange. It was endorsed by

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the payee, before due, in these words : "For value received, I assign the within note to Josiah Thornburgh, and hold myself responsible for the payment of the same; the said Pearson [the maker] to have two years in which to pay same, unless he prefers to pay sooner; interest on same to be paid annually." The note was then endorsed by Thornburgh to the plaintiff in these words : "I hold myself responsible for the payment of the within note."

The answer admitted the endorsement, and that the defendant thereby agreed that he would hold himself responsible for the payment of said note, though the maker was to have two years in which to pay the same, unless he preferred to pay it sooner, with interest to be paid annually ; but denied that he agreed to pay the said note, if the same was not paid within two years, without demand and notice, and without all reasonable means being used to collect the note of the maker.

The court instructed the jury for the plaintiff, that the endorsement of the payee constituted a complete and perfect waiver of demand and notice, and refused instructions for the defendant to the effect that he was not liable without proof of demand and notice, nor unless due diligence had been used to collect the note of the maker, treating the endorsement as a guaranty.

There were some other matters of dispute relating to a set-off and counter-claim. These were not much insisted on in the argument, and we have found nothing in the action of the court below in respect to them which it is deemed necessary to notice further.

The defence rests upon the questions arising upon the endorsements. On this subject we think the instructions of the court below were correct. Neither of these endorsements was in any legal sense a guaranty. It amounted to a waiver of demand and notice, and was an absolute engagement to be liable on the note. The note was negotiable, and still remained negotiable by endorsement. Without these words, it would have been necessary to make presentment and de-

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mand of payment on the day when the note became due and payable, and give due notice to the endorsers in order to fix their liability. They say that they will hold themselves responsible for the payment of the note, though the holder should give the maker two years' time in which to pay it; that is to say, they agree that their liability shall be considered as fixed, without the usual demand and notice, in the same manner as if demand was made and notice given, as required by law, for the purpose of fixing the liability of endorsers. The first endorser further agrees that the holder may give the maker two years' time for payment, he paying interest annually. The liability of the endorser having been already fixed by the previous absolute promise to pay the note at all events, the holder could have given this time to the maker as well without this consent as with it. He was not bound to use diligence to collect the note of the maker. One of two things must be true, either that demand and notice were waived, or that the endorsers were both discharged for want thereof when the note fell due, according to its tenor. Unless the words used are to have the effect of a waiver and an absolute liability, they would be wholly without meaning. The word *guaranty* is not used, and there is nothing in the language from which it could be inferred that the party intended only to guaranty that the holder should be able to collect the note of the maker after two years, on presentment and demand, with due notice to him after that time. Demand and notice have been held to be no part of the contract of the endorser, but merely a step in the legal remedy, which may be waived even by parol. (*Barclay v. Weaver*, 19 Penn. 396; *Sto. Prom. N.*, § 148.) Where the words of the payee and endorser were, "I sell, assign and guaranty the payment of the within note," it was held to be a waiver of demand and notice, and an absolute undertaking to pay the note. (*Allen v. Rightmere*, 20 J. R. 364.) So, also, where the endorser said, "I will stand responsible" (*Ridgeway v. Day*, 13 Penn. 208); and, also, where the words were "holden for the within note" (*Blanchard v.*

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Wood, 26 Me. 358; Bean v. Arnold, 16 Me. 257); and the same doctrine was very explicitly held in Amoskeag Bk. v. Moore, 37 N. H. 539). And in Sage v. Wilcox, 6 Conn. 81, cited by the defendant, it was conceded that if the endorsement had stipulated, not for the ability of the maker only, but for the advancement of the money on a day prefixed, the contract would have been absolute. Both an endorser and a guarantor may incur an absolute and positive liability to pay the note at all events, according to the form of the endorsement and the intent of the parties. (Sto. Notes, § 461.) We are well satisfied that such was the operation and effect of these endorsements.

Judgment affirmed. The other judges concur.

CITY OF ST. LOUIS TO USE OF FELIX A. McDONALD, Respondent, v. OCTAVIA BOYCE et al., Appellants.

Courts—Jurisdiction.—The Law Commissioner's Court of St. Louis county has no jurisdiction in actions to enforce liens against real estate. (City to use, &c., v. Rudolph, 36 Mo. 465.)

Appeal from St. Louis Law Commissioner's Court.

Alex. Martin, for appellant.

Wickham, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This case depends upon the jurisdiction of the Law Commissioner's Court in actions to enforce liens against real estate. It was decided here at the last term that the Law Commissioner's Court had no jurisdiction in such cases. (City to use, &c., v. Rudolph, 36 Mo. 465.) The judgment was for a special execution against the real estate, and not merely for the debt independent of the lien, as in Kinnear v. Jones, 24 Mo. 83.

Judgment is reversed and the suit dismissed. The other judges concur.

Nave et al., v. Home Mut. Ins. Co.

ABRAM NAVE *et al.*, Respondents, v. HOME MUTUAL INSURANCE COMPANY, Appellant.

Insurance—Cause of Loss.—A policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. If from any defect of construction or overloading the building fall into ruins, and subsequently the materials take fire, the insurer is not liable for the loss.

Appeal from St. Louis Circuit Court.

Grover, Sharp & Broadhead, for appellant.

The contract of insurance is a contract *strictissimi juris*. (1 Phil. Ins. 231.) It will embrace no other property than that described. In this case, the insurance is upon a "brick building, occupied as a wholesale and retail grocery store." It is not contended that a change in the building was caused by the assured, or indeed that there was any change or alteration in the building at all.

In this case the company did not insure a lot of rubbish, but a building. Nothing was insured in this case but a "building used as a wholesale and retail grocery store," and the company is liable for the loss of nothing else.

In case of insurance against loss or damage by fire only, as in this case, the underwriter can only be held liable where the fire is the effective and direct cause of the destruction of the subject or thing insured. (1 Phil. Ins. p. 625, § 1097.)

The risk or peril insured against includes only the direct effect or result of the cause or agency insured against—on the thing insured—not a remote or incidental result. (1 Phil. Ins. 667-72; 12 Eastm. 647-52.)

If the brick house fell down from a defect in its construction, or from the floors being overladen by plaintiffs, and this falling caused its destruction, and also caused fire in the ruins after it had fallen, the underwriter is not liable. (Boyd v. Du Boys, 3 Camp. 133.)

Glover & Shepley, for respondents.

The instruction given on defendant's motion declares that

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"if the house fell before the fire, the defendant was liable for such damage as the fire occasioned, and cannot be controverted here by him." This instruction substantially told the jury that damages occasioned by fire under such circumstances were recoverable on the policy.

The falling of the house was an accidental cause of the fire, and as much covered by the policy as an earthquake, lightning, or fermentation, when they cause fire to the injury of insured property.

Take it in its strongest aspect as a loss remotely occasioned by the negligence of the assured, and this has always been held not to discharge assurers. (2 Arn. Ins. 764-7, §§ 284-5, and cases there cited. See remarks of Denio, J., at p. 19, and Johnson, J., at p. 523, of *St. John v. A. F. & M. Ins. Co.*, 1 Kern. 516; *Holdsworth v. Wise*, 7 B. & Cr. 794.)

HOLMES, Judge, delivered the opinion of the court.

It was conceded that there was evidence in the case tending to show that the building, which was the subject insured, being used as a store and warehouse, and the floors being heavily loaded with merchandise, by reason of the overloading, or of some defect of construction, before the happening of the fire, and without any agency of fire, fell down and became a mass of rubbish; and that the fire, which occasioned the loss afterwards, arose in the fallen materials. There was evidence also, as it was admitted, tending to support the petition.

The court instructed the jury that, if the building was destroyed by fire as alleged in the petition, the plaintiffs were entitled to recover; and refused to instruct for the defendant, that if the house fell down before the fire, and the fall of the house caused the fire, or the fire was caused by the house falling upon matches or other combustibles, they should find for the defendant.

An instruction was given for the defendant to the effect that, if the house fell before the fire, the defendant was only liable for the damages actually occasioned by the fire, and

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not for that occasioned by the fall. On the facts supposed, we are clearly of the opinion that the defendant's instruction ought to have been given. The subject insured had ceased to be such, and became a mere congeries of materials before the fire occurred, and by reason of a cause not insured against in the policy. The maxim "*causa proxima non remota spectatur*" has not application to such a case. If the fire had been the immediate cause of the destruction and the loss, then the remote causes of the fire might have been immaterial. The cause of the loss of the subject insured was not the fire, but the fall. That a fire sprang up afterwards in the rubbish, and destroyed the fallen materials, was wholly another matter. The materials were not insured. The building insured no longer existed as such, and it ceased to exist by reason of a peril not insured against.

The fire must be the efficient cause, and the loss the direct effect of the fire. (1 Phil. Ins. 625.)

The instruction which was given for the defendant proceeded upon an erroneous view of the defendant's liability, and might as well have been refused with the rest.

Judgment reversed, and cause remanded. The other judges concur.

THOMAS S. NELSON, Respondent, *v.* JOHN BOLAND, Appellant.

1. *Payment—Evidence—Receipt.*—A receipt to be evidence of payment must be in the possession of the party purporting to have paid the money; while in the possession of the creditor it is no evidence of payment by the debtor.
2. *Practice—New Trial.*—Judgment set aside because there was no evidence to authorize the verdict.

Appeal from St. Louis Law Commissioner's Court.

Jewett, for appellant.

The judgment of the Law Commissioner's Court is asked to be set aside as being entirely without evidence to support

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it. That this court will set aside a judgment that has been rendered without evidence to support it, has been decided by this court in the cases of Morris v. Burnes' adm'rs, 35 Mo. 412, and Heyneman v. Garneau, 33 Mo. 565.

C. G. Mauro, for respondent.

LOVELACE, Judge, delivered the opinion of the court.

This was an action to recover back money claimed to have been twice paid upon an account. The plaintiff introduced in evidence a paper purporting to be an account current of items purchased by the plaintiff of the defendant. In the year 1855 this account was footed up, and a balance of one hundred and ten dollars appeared against Nelson. The account then seemed to be receipted in full, when another account between the same parties was added on to the same piece of paper, and under the first receipt, running on to 1859, when the account was again footed up, and the balance of one hundred and ten dollars of the first account added into the second account, when it was again receipted in full. The only question in the case is, whether this account thus receipted is any evidence that the one hundred and ten dollars was twice paid. The court below held that it was, and rendered a verdict for the plaintiff; and the defendant asks to reverse that judgment, for the reason that there was no evidence to support it.

A receipt, to be evidence of the payment of money, ought to be in the possession of the party who paid the money. A receipt in the possession of the opposite party certainly proves nothing more than his willingness to receive the money and give a receipt therefor. There was not only no evidence offered by the plaintiff to show that the receipt in question was ever in his possession between 1855 (the date of the receipt) and 1859 (the date of the last settlement), but the defendant showed that this identical receipt was in his possession during that time. The receipt, then, utterly failed to prove any payment in 1855, not having been deliv-

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ered to the plaintiff, and there was no evidence whatever to base the verdict and judgment upon.

The case is therefore reversed, and the cause remanded. The other judges concur.

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HENRY MEYERS, Respondent, *v.* RICHARD R. FIELD *et als.*,
Appellants.

1. *Partnership.*—Parties cannot by any agreement as between themselves avoid the consequences of acts which constitute them partners as between themselves or as to third parties.
2. *Practice—Pleading—Equity.*—The distinction between law and equity still exists in our practice, and parties seeking equitable relief must set forth the facts in their pleadings in such a manner as to entitle them to the equitable relief prayed. Where matters of equitable jurisdiction are mixed and blended with matters of legal cognizance in the same count, the defect may be taken advantage of by demurrer, or by motion in arrest. Pleadings should be drawn with reference to these distinctions, though in the form prescribed by the statute.

Appeal from St. Louis Circuit Court.

The cause came to an issue on the amended petition and answer. The amended petition is in these words:

"The plaintiff states that the defendants are copartners in business, in the city of St. Louis, under the firm name of Field Bros.; that on or about the month of December, 1858, he entered into an arrangement with defendants, who were then, and have been since, wholesale dealers in drygoods and tailoring stock in the city of St. Louis, by which agreement the plaintiff was to conduct a retail business in ready-made clothing in said city, and said defendants were to supply the raw material for said business out of their stock, at their regular wholesale prices for the same; that is, they were to supply plaintiff with all the goods necessary to carry on said business, so far as the same could be supplied out of their regular stock, at their regular wholesale prices for the same.

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Plaintiff was to supply all the other goods necessary to carry on said business himself, and, in consideration that plaintiff should bestow on said retail business his labor, custom, and business qualifications, he was to receive all the net profits arising from the sale of said goods, and resulting from said business, after paying the expenses thereof.

" Plaintiff states that he entered into said agreement with said defendants, and purchased goods therefor from defendants and others, and carried on the said business of manufacturing and selling ready-made clothing at the store-room No. 99 North Third street, in the city of St. Louis, from December, 1858, until said defendants broke up said business by taking possession of said store and stock about January 3, 1860, hereinafter mentioned; that during that period he obtained from said defendants large quantities of goods, and settled for the same in pursuance of said agreement.

" Plaintiff states that it was understood and agreed that plaintiff should pay over to said defendants the proceeds of said store, from the sales thereof, to the amount of the bills invoiced by said defendants to plaintiff, after paying the ordinary and current expenses of carrying on said business, cost of manufacturing, and other requisite outlays.

" Plaintiff states that he complied with his said agreement on his part, and fairly and honestly carried on said business to the best of his ability. And said plaintiff states that, during the period referred to, he had purchased from other houses than defendants', goods for the use of said business, with the knowledge and consent of said defendants, and such as were not kept for sale in the store of said defendants, and which were necessary for said retail business.

" Plaintiff states that on or about January 1, 1860, the said defendants took possession of store building, stock, evidences of indebtedness, and assets, to the amount of \$13,218 73 cts., the particulars and items of which will appear by an account filed with the original petition in this cause, marked 'Exhibit A.' "

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Amount of stock taken by Field Bros., January 3, 1860, at cost,	\$ 9,437 35'
Building, - - - - -	1,500 00
Fixtures of store, - - - - -	816 50
Bills receivable, as per annexed schedule, - - - - -	1,464 88
	<u>\$13,218 73</u>

"And plaintiff further states that said building, mentioned in said exhibit, had been, previously to the time of entering into said arrangement with defendants, purchased by them for the use of plaintiff at the price and sum of fifteen hundred dollars, and that said sum had been by these defendants charged in the account against this plaintiff, and paid by this plaintiff to said defendants and received by them.

"And plaintiff states that by reason of their taking possession of and retaining said building, and of their receiving and retaining the rents and profits of the same, and keeping the possession thereof, he is entitled to be credited on his account with the said sum of \$1,500, so paid by him to them for said building.

"Plaintiff states that the total amount for which these defendants were entitled to credit for goods, merchandise, &c., so delivered by them as aforesaid up to the 3d day of January, 1860, was the sum of \$11,489.99, the particulars and items of which will appear by an account filed with the original petition in this case, and made an exhibit, marked "B."

STORE 99 NORTH THIRD STREET,

	To FIELD BROS.	Dr.
Statement, January 23, 1859, - - - - -	\$ 7,806 12	
" July 1, 1859, - - - - -	5,967 81	
" January 3, 1860, - - - - -	4,368 48	
	<u>\$18,137 36</u>	
Cr. By Cash, as per book, - - - - -	6,667 87	
	<u>\$11,469 99</u>	

"And plaintiff states that the excess of the amount so taken, as per Exhibit A., over the amount for which defendants were entitled to credit, as shown in Exhibit B., to-wit, the sum of one thousand seven hundred and forty-eight dollars and seventy-four cents (\$1,748.74), was the property of

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this plaintiff, and was partly the profits arising from said business, and which, according to said agreement, properly belonged to this plaintiff. Yet the said defendants, disregarding plaintiff's rights in the premises, and intending and contriving to cheat and defraud the said plaintiff out of his just rights, did on the 3d day of January, 1860, take into their possession, keep and retain, and have ever since kept and retained, said building, stock, evidences of debt, assets, &c., mentioned in Exhibit A., whereby the said defendants became indebted to this plaintiff in the sum of seventeen hundred forty-eight dollars and seventy four cents, which this plaintiff says is justly due and owing to him by said defendants, and have utterly failed and neglected to account to, or pay the same, or any part thereof. Whereupon plaintiff prays judgment, &c."

The defendants answered, the case was referred to a referee, exceptions taken to his report by defendants, which were overruled, judgment entered upon the report, and motion by defendants for a new trial and in arrest, which were overruled, and defendants appealed.

Krum & Decker, for appellants.

I. The Supreme Court will examine the proceedings before the referee, and see whether justice has been done between the parties, although no motion for a review was made, nor exceptions saved. (*Shore v. Coons*, 24 Mo. 556.)

II. The referee committed an error in his construction of the petition. There is no power in the referee to give plaintiff a judgment, or relief which he does not seek. (*Perry v. Barret*, 18 Mo. 145; 28 Mo. 82.)

III. The petition presents more similarity to a bill in equity for the adjustment of mutual accounts than to any other legal proceeding.

a. The equity for an investigation and adjustment of accounts is well established, and forms a distinct branch of chancery jurisdiction. (Adams' Eq. 222 et seq., and cases there cited.)

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The only relief which he seeks is for a settlement of accounts, and payment to him of a balance which he claims is due him.

2. That, as an action to recover for a tort, or petition in nature of trespass or trover, the petition is fatally defective. It does not present a cause of action in trespass or trover.

a. The petition must state facts sufficient to constitute a cause of action.

The code has only abolished the forms of action; the same principles of pleading which governed before the code, in all other respects, continue to exist. The code nowhere defines what shall constitute a cause of action; the same cause of action still continues. (6 How. Pr. 229; 19 Barb. 560; 27 Barb. 310; Nash's Ohio Code, p. 45; Chit. Pl. 215.)

Our own Supreme Court have adopted these views, as will be seen by an examination of the cases—Mooney v. Kennett, 19 Mo. 551, &c.

Glover & Shepley, for respondent.

I. The allegations in the petition were sufficient, under the code, to maintain trover. No technical description of wrongs is now required. (R. C. 1855.) The allegations in petition are good at common law; the mode of taking is immaterial; the fraudulent keeping is the gist of the action. (2 Wheat. Selwyn, p. 1400.)

II. The exceptions were all grounded on some misconception of facts.

a. The plaintiff did own the stock of goods. He was, by contract with the defendants, to make them up and sell them, and was to pay defendants out of the proceeds, and as fast as realized, which he did. Under these circumstances, he was not only owner of the stock, but absolutely entitled to the possession of them.

b. No demand for the goods was necessary. Even if demand was necessary, it only affected the costs. (R. C. 1855, § 34, p. 448.)

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HOLMES, Judge, delivered the opinion of the court.

The petition in this case appears to have been drawn in utter disregard of the rules of pleading, either at law or in equity. It is neither a good bill in equity, nor a good cause of action at law. The transactions disclosed by the facts stated in it would seem to amount to a partnership in a joint adventure, upon which, if the petition were properly framed, it is probable that the plaintiff would be entitled to equitable relief, as upon the dissolution of a partnership, and for an account to be taken, and stated for the purpose of ascertaining the balance of account which might be found to be due the plaintiff as a partner. The arrangement seems to have been one of those not uncommon attempts on the part of the parties concerned, either designedly, or in ignorance of the law, to make agreements and arrangements among themselves for conducting any business, in contravention of the rules of law, whereby they seek to avoid the name, duties, liabilities and responsibilities of partners *inter se*, or as to third persons, while entering into agreements and transactions which, by the law of the land, constitute them partners, whatever they may please to say or think about it, or by whatever name they may choose to call it. It would appear that the defendants were to furnish a large part of the capital stock in trade, and that the plaintiff was to put in his personal services and skill, as well as to furnish a part of the capital stock; that his work as a manufacturer was to be mixed with the raw material supplied by the defendant or himself; that for the supplies of goods which he should receive from the store of the defendants' separate firm, they were to be allowed in settlement their own wholesale prices, whereby their share in the profits in the joint business would be ascertained and limited; that the plaintiff was to receive, in full compensation for his services, skill, and attention to the business, all the profits which might be realized on the sale of the manufactured articles over and above the costs and expenses, the capital invested, and that portion of the profits which would go the defendants in the shape of their

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wholesale prices, whereby all the losses, if any could happen under such an arrangement and course of business, would be thrown on the plaintiff, in diminution of his share of the profits; that real estate was leased or purchased for the use of the business, and expenses incurred on the joint account, with the knowledge and consent of the defendants; that balances were settled from time to time on this basis, and that at the close of business a balance of account on the whole transaction still remained unsettled; and that the defendants, in violation of the rights of the plaintiff, as he claims, suddenly put a stop to the business by stepping in and assuming to themselves the entire possession and exclusive control of the whole concern. In such case there is such a community of interest in the capital stock, or in the profits and losses, or in both, as will make the transaction a partnership (Sto. Part. §§ 23, 27); and the proceedings in this case sufficiently show that any fair adjustment of the rights of the parties must require the interposition of a court of equity, and would constitute a proper subject of equitable jurisdiction in the settlement of partnership accounts, and that no adequate and complete remedy can be had in the strict course of legal proceeding.

The petition is not framed upon such a case, though some of the facts are stated. It does not ask for any equitable relief. It does not distinctly allege that there was a partnership; nor does it pray for a dissolution to be decreed, nor for an account to be taken and stated, nor for judgment for the balance of account that may be ascertained to be due the plaintiff. It contemplates legal relief only. The plaintiff assumes to state his account for himself, and asks judgment for a specified sum as upon an indebtedness due him at law.

The respondent presents his case here as an action of trover, and so the referee seems to have considered it in his proceedings and report. It was plainly not a proper case for action in the nature of trover. The petition is not so framed. Where matters of equitable jurisdiction are mixed and blend-

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ed with matters of legal cognizance in the same count, the court will not undertake narrowly to sift the petition in order to see if the essential elements of a cause of action at law can, by any construction, be made out and separated from the rest. Such a petition may very well be held to be demurrable for that reason alone, as not containing a cause of action stated with that degree of certainty which the law requires. Where two or more good causes of action are clearly stated in the same count, it has been held that the irregularity in pleading was not one of the enumerated causes of demurrer, and that the proper course would be a motion to the court to compel the plaintiff to elect on which cause of action he would proceed. (*Mooney v. Kennett*, 19 Mo. 551.) If no good cause of action be distinctly stated, the objection is not waived by failure to demur, (*Ivory v. Carlin*, 30 Mo. 142,) but may be taken on motion in arrest, or writ of error.

The distinction between law and equity has not been abolished by the new code of practice. Equitable rights are still to be determined according to the doctrines of equity jurisprudence, and in the peculiar modes of proceeding which are sometimes required in such cases; and legal rights are to be ascertained and adjudged upon the principles of law, and the rules of proceeding at law are in many respects very different from those which are applicable to equity cases. Pleadings should be drawn with reference to these distinctions, though in the forms prescribed by the statute. Where the petition is framed for legal redress, the plaintiff cannot be allowed to prove equitable rights, though the facts be stated to some extent in his petition. If he seeks equitable relief, the facts must be stated in such manner as to show that he is entitled to the relief prayed for, as under the former practice; and if he claim redress at law, the essential elements of his cause of action must be stated with such clearness and certainty as to be intelligible to professional, if not to ordinary, comprehension. (*Richardson v. Means*, 22 Mo. 87; *Maguire v. Vice*, 20 Mo. 427; *Hesse v. Mo. State Mut. F. Ins. Co.*, 21 Mo. 93.)

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The statute requires that the petition shall contain, not only a plain statement of the facts constituting the cause of action, but also a demand of the relief to which the plaintiff may suppose himself entitled; and if a recovery of money be demanded, the amount thereof, or such facts as will enable the defendant and the court to ascertain the amount, must be stated. These provisions evidently contemplate that the relief demanded may be either such as may be granted in equity, or such as may be given at law, according to the nature of the case stated in the petition. (R. C. 1855, p. 1229, § 3.) The provisions of the statute concerning the trial by the court or jury recognize the same distinction of cases at law, or in equity. (Art. X., §§ 11-18.) Any issue of fact in the action may be referred to a referee upon the written consent of the parties; but where the parties do not consent, the court can order a reference only in certain specified cases; and these are such as fall within the jurisdiction of courts of equity, and in which the constitutional right of trial by jury cannot be demanded.

In this case the court ordered a reference without the written consent of the parties, thereby treating it as a case of equitable jurisdiction; but the referee appears to have proceeded as if it had been an action at law. There was no trial by jury. A prayer for relief was an essential part of a bill in equity, and a demand for relief in accordance with the facts stated in the petition is now an essential part of the petition.

It is deemed unnecessary to review in detail the exceptions to the report of the referee. In the review we have taken of the case, the proceedings were erroneous from the beginning. We hold that the petition was demurrable; that the defect was not waived by the failure to demur, and that the motion in arrest should have been sustained.

The judgment is reversed and the cause remanded, with leave to the plaintiff to amend his petition. The other judges concur.

Holzbauer et al. v. Heine et al.

PHILIP HOLZBAUER *et al.*, Respondents, *v.* JOSEPH HEINE *et al.*, Appellants.

Practice—Pleading—Counter-claim.—An answer of defendant, setting up an account of payments made by defendant to plaintiff, &c., is not a counter-claim, and is not confessed by the plaintiff's failing to file a replication; it is a plea of payment in bar of the action.

Appeal from St. Louis Land Court.

Krum & Harding, for appellants.

Wingate and Harris, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought in the St. Louis Land Court to enforce a mechanic's lien for work and materials furnished by the respondents in building certain houses in the city of St. Louis. The answer traversed the allegation of the petition, and set up as a defence payments to an amount in excess of the plaintiffs' demand. No reply was filed to the answer.

At the trial, the appellants' counsel moved the court to give judgment by default against the respondents, because no reply was filed. This motion was overruled by the court, and exceptions were taken.

After the evidence in the case was submitted to the jury, the appellants asked the court to instruct the jury, that the plaintiffs not having filed any pleading traversing or denying the account set up as a defence to the demand set forth and claimed in the petition, they should therefore consider the account as admitted; which instruction the court refused to give, and a verdict being rendered for respondent, the case was brought here by appeal.

In pleading under the code, the answer of the defendant must contain a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; or a statement of any new matter constituting a defence or counter-claim (R. C. 1851, p. 232, § 12.) The counter-claim must

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be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action. (§ 13.) A counter-claim must contain the substance necessary to sustain an action, on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It must have a tendency to show an independent cause of action, a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued on, or on some other contract. Where there is no counter-claim set up in the answer, there is no necessity of a reply; and the failure to put one in, is not an admission of anything stated in the answer. (*Vasseur v. Livingston*, 3 Kern. 248, affirming S. C. 4 Duer, 285.)

The term counter-claim is new to the law, and not to be found in the dictionaries, and some of the New York judges have animadverted with great severity on the framers of the code for using a term not only new but which had no definitely established legal meaning.

But surely the term is sufficiently plain and simple, where the defendant has against the plaintiff a cause of action upon which he might have maintained a suit, such cause of action is a counter-claim. The parties, then, have cross-demands, and, in effect, there are two causes of action before the court, for trial in the same suit. Both parties are to a certain extent plaintiffs and both defendants.

The answer, then, does not substantially differ from a petition, and the reply to the answer performs substantially the same office as the answer to the petition. Each party claims affirmative relief from the other.

If both parties establish their claims, the judgment is rendered for the one or the other, accordingly as his demand may be found to be in excess.

From this view of the elements which are essential to constitute a counter-claim, it is manifest that the matter stated by the appellants in the answer did not amount to such a pleading.

Where the defendant sets up a counter-claim in pleading,

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the presumption is that the plaintiff has a good cause of action against him, and he proposes to meet it by establishing another cause of action against the plaintiff.

But here the appellants say in effect in their answer, that the respondents had no cause of action against them at the commencement of the suit; that when the action was begun they had fully paid off and satisfied the demand claimed in the account. The answer, then, does not plead a counter-claim which would go to establish an independent cross-demand, but payment of the account, which goes simply to the defence of the action.

There is no pretence of a cross-demand against the respondents. The allegations in the answer assert that there was no cause of action against the appellants; that the amount sued for had been paid.

Such matters required no reply. There are two items, the claim for lumber and damages, which are properly the subject of counter-claim; but as they are included in the account for payment, and pleaded as payment, they cannot be distinguished from the balance.

Judgment affirmed. The other judges concur.



NERÉE VALLÉ, Respondent, *v.* NORTH MISSOURI RAILROAD COMPANY, Appellant.

1. *Arbitrations—Award—Practice—Supreme Court.*—It is too late to urge in the Supreme Court, as an objection to an award, that the arbitrators were not sworn; the objection should have been made in the court below.
2. *Arbitrations—Award.*—It is not necessary, under the statute, that an award should be attested by a subscribing witness, unless the submission provides that the award shall be made the judgment of the Circuit Court, and be enforced according to the provisions of the statute. (R. C. 1855, p. 195, § 6.)
3. *Practice—Pleadings—Evidence.*—No evidence is required of facts admitted by the pleadings.
4. *Arbitrations—Award—Mistake of Arbitrators.*—An award will not be set aside upon motion, or vacated for any mistake of law or fact that does not appear upon the face of the award itself. But where a court of equity is resort to to set aside an award on the ground of fraud, prejudice, or mistake, extrinsic evidence may be resorted to, and the arbitrators may themselves be witnesses. A court of equity will not relieve those who have not used due diligence to protect themselves.

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Appeal from St. Louis Court of Common Pleas.

Submitted for appellant upon brief formerly filed by *Judge Holmes.*

I. The paper purporting to be a copy of a written submission and award was not competent and admissible evidence, and should have been excluded for the following reasons:

1. The absence of the original, as best evidence, was not accounted for, and no foundation was laid for the introduction of a copy as secondary evidence.

2. No proof was made of the execution of the original by the parties (2 Greenl. Ev. §§ 71, 74); the signatures of the parties must be proved. The execution was not admitted as not being denied under oath in the answer, for the reason that the instrument of writing was not filed with the petition, nor alleged therein to be lost or destroyed, with profert of a copy. (R. C. 1855, p. 1240, §§ 59, 60, 61—p. 1267, § 45.) When alleged to be lost or destroyed, the execution must be proved; so, when not filed with the petition, the defendant is not charged with the execution of the instrument, within the meaning of § 45, and can have no inspection of it. (McCormick v. Kayser, 13 Mo. 131.) Under the practice of 1845, a declaration on an instrument of writing without profert, or excuse, was bad on demurrer.

3. It did not appear that the arbitrators had been sworn at all under the submission. (Toler v. Hayden, 18 Mo. 399.) If the arbitrator be not sworn before proceeding to hear evidence, it is a "misbehavior," and renders the award invalid. (Frissell v. Fickes, 27 Mo. 557; Combs v. Little, 3 Green. Ch. 310.) Unless arbitrators are sworn, the whole proceedings are void. R. C. 1855, p. 194, § 3, "before proceeding to hear any testimony, the arbitrators shall be sworn."

All written submissions are within the statute, whether agreed to be made a judgment of court or not. (R. C. 1855, p. 194; Bridgman v. Bridgman, 23 Mo. 272; Bloomer v. Sherman, 5 Paige, Ch. 575; Cope v. Gilbert, 4 Denio, 347.) Our statute is taken from the New York statute, and is

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nearly identical with it. (2 R. S. N. Y. 441, Albany ed. 1836, p. 446-9; Kyd on Awards, 380, note r.; Williams v. Craig, 1 Dall. 313.)

4. The signing of the award was not attested by a witness. (R. C. 1855, p. 195, § 6; Newman v. LaBeaume, 9 Mo. 29, 34; Bloomer v. Sherman, 5 Pai. Ch. 575.)

II. The special defence set up in the answer, and the issue on which the trial was had before the court (no jury being called for), was of matter cognizable in equity, and the case is to be determined according to the principles of equity jurisprudence. Curran v. Sellew, 28 Mo. 322, the mode of trial is to be determined by ascertaining whether, under the old system, the case would be cognizable at law, or in equity. Ellis v. Kreutzinger, 31 Mo. 432, the distinction between law and equity is retained under the code so far as to furnish the rule as to the former. R. C. 1855, p. 1233, § 13; Adams' Eq. [193], 375, where the submission rests on mere agreement, and is not a rule of any court, the jurisdiction is exclusive in equity. Flournoy v. Holcomb, 2 Munf. 34, courts of law and equity have a concurrent jurisdiction to revise awards. 2 Greenl. Ev. § 78; Watson Arb. 279 [57 Law Lib. 163], "every ground of relief against an award in equity is equally open in a court of law," when the court has taken jurisdiction of the case. R. C. 1855, p. 198, § 23, the statute does not "impair, diminish, or in any way affect the authority of a court of equity" over awards.

Equity jurisdiction not being restricted by the statute, the inquiry here is not limited to statute grounds for vacating an award, (§ 9, p. 195,) as it might be in a case agreed to be made a rule of court, and brought into court for judgment on the award, as a proceeding at law.

III. A court of equity will vacate an award, not only for corruption, partiality, or gross misbehavior of the arbitrators, but for the suppression or concealment of material facts by a party, or for a mistake of a material fact by the arbitrators, which they themselves admit, or a mistake of law, un-

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less the questions of law were expressly referred to their decision by the terms of the submission ; and of all these matters extrinsic evidence is admissible. 2 Sto. Eq. § 1456; Sto. Contr. § 985, *j.*; 2 Com. Dig. 376; Chan. 2 K. 2, 377; Adams' Eq. [192] 375, "if they have acted on a mistake as to a material fact, admitted by themselves to have influenced their judgment"; Kyd on Awards, 354, "where any circumstance is suppressed by either of the parties, or concealed, and the arbitrator declares that, had he known that circumstance, he would not have made such an award," or if it "might be reasonably supposed that his award would have been different," 356; 358, "the fact of concealment will be investigated"; 380 *a.*, note *v.*; Williams v. Craig, 1 Dall. 313; Watson on Arb. 281; Knox v. Simonds, 1 Ves. Jr. 369-78; Morgan v. Mather, 2 Ves. Jr. 18; Van Courtland v. Underhill, 16 Johns. 405; id. 408-9; Shinnie v. Coil, 1 McCord, Ch. 478, 485; Bulkley v. Stearns, 2 Day, 552; Kirby, 356, for suppression of a material fact; Galloway v. Hill, 4 Bibb, 475; Young v. Walker, 9 Ves. 364.)

IV. R. C. 1855, p. 1536, § 8, a dedication of streets to public use vests the fee in the county for the use of the public. (City of Hannibal v. Draper, 15 Mo. 634.)

The evidence showed that the dedication was made by Wilkinson's trustees on the 16th April, 1858, and that Nérée Vallé acquired title to certain lots in the addition, on either side of the street, by deed of the 17th April, 1858, and that the Company, not knowing of the dedication, supposed they had to acquire a strip 100 feet wide, as in case of country farming lands.

Glover & Shepley, for respondent.

I. The agreement for submission and the award was a good common law submission and award, on which the plaintiff well brought his action at law, without proceeding to enter judgment under the statute. (4 Blackf. 253, 89.) In the latter case it was held, if there was in the submission no provision for entering judgment on the award, then there was

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no remedy to enforce it but an action at law. To the same effect are the rulings in 5 Wend. 519-20; 9 J. R. 212; 20 Barb. 484.

In the same case, it is said when the submission is in writing, with no stipulation for entering judgment on the award, only sections 3, 4, 5, 6 and 7 apply; that is, that all submissions in writing are either wholly or partially governed by the New York statute of arbitrations. Those which contain a stipulation for entering judgment on the award are governed by all the provisions of the statute. Those submissions in writing which do not contain such a stipulation are governed by sections 3, 4, 5, 6 and 7, but in other respects stand as they would at common law. (1 Abbot's N. Y. Dig. p. 216, § 162, and references there made,) This submission not containing any stipulation for entering judgment, the special provisions intended for that purpose have no application.

II. The swearing of the arbitrators was not indispensable. It was not required by the common law (4 Comst. 157), nor was the subscribing witness of more moment. The parties might waive any formalities required by the statute. (10 Johns. 143; 2 Hill, 440; 1 Denio, 440; 1 Hill, 321; 20 Barb. 484; 9 Barb. 246; 1 Barb. 591.)

III. The 6th section of our "Act concerning arbitrators" (R. C. 1855, p. 195) expressly declares that the subscribing witness is required only in case the judgment is to be entered on motion pursuant to said act.

IV. The objection that that award was not attested by subscribing a witness was not made prior to the trial below, nor at the trial, and cannot be entertained now. (6 Hill, 303.)

V. There was no cause shown for vacating the award, either under the statute, or out of it. There is no allegation of partiality or corruption. It is said Vallé misrepresented his title (29 Mo. 184-8); but it is not pretended he did so knowingly (34 Mo. 524), nor can it be shown that his statement was untrue. He did own the whole of the land, and

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really believed himself entitled to compensation for all of it. (21 Mo. 584; 3 Hill, 567.)

LOVELACE, Judge, delivered the opinion of the court.

This is an action brought by the plaintiff to recover the amount of an award made in his favor against the defendant on account of constructing the railroad over certain lands claimed by the plaintiff. The court below gave judgment for the plaintiff, to reverse which the case comes here by appeal. Several grounds are assigned for error in the court below, but they all resolve themselves into three: 1. The arbitrators were not sworn; 2. Improper evidence was admitted on the part of the plaintiff; and, 3. A mistake of a material fact by the arbitrators in making their award.

I. It is urged that this was a submission under the statute, and that the statutes require the arbitrators to be sworn before they proceed to the discharge of their duties. In *Bridgman v. Bridgman*, 23 Mo. 272, it was held that every submission in writing is a submission under the statute, and that an oath taken by the arbitrators in such cases is not a voluntary oath, but one required by the statute. The same doctrine has been held in New York, under a statute nearly identical with our own—*Cope v. Gilbert*, 4 Denio, 347; *Bloomer v. Sherman*, 5 Paige, 578. So it would seem that in every submission in writing the arbitrators ought to be sworn; but it is certainly too late to make that objection in this court, when it was not made in the court below. Perhaps, if this objection had been urged there, the plaintiff could have produced proof that they were sworn, or that it was expressly waived by the parties.

Another objection may be entertained in this connection, that the award was not attested by a subscribing witness. This is not made necessary under our statute, unless the submission provides it shall be made the judgment of a Circuit Court, and enforced according to the provisions of the statute. (R. C. 1855, p. 195, § 6.)

II. The second ground assigned for error is, the admission

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in evidence of copies of the agreement to submit to arbitrators, and the award, without showing the loss or destruction of the original. Had the pleadings made any issue about these papers, it would certainly have been error to have proved them by copies until the absence of the originals was accounted for. But the petition sets out their contents, and the answer not only fails to deny, but expressly admits them as set out. So, inasmuch as no issue was made about them, no harm could result from reading the copies.

III. The third and last point to be noticed is the mistake by the arbitrators of a material fact. Upon this point there seems to be two separate and distinct classes of cases: those where the award is sought to be vacated upon motion, and those where courts of equity are resorted to to set aside the award for fraud or concealment. In the first class of cases, it seems that the award will not be set aside or vacated for any mistake of law or fact that does not appear upon the face of the award itself. (Wats. Arbitr. 292.) But in the second class of cases, it seems that extrinsic evidence may be resorted to to show that the arbitrators have acted through prejudice, or that there have been fraudulent practices or concealments by the prevailing party. (2 Greenl. Ev. § 78.)

In *Knox v. Symmonds*, 1 Ves. 360, it is said by the Ld. Chancellor, that if the arbitrators have acted upon a mistake of a material fact, admitted by themselves to have been made, and to have influenced their judgment, the award ought to be set aside. This point was not before the court, however, in the case above referred to, and nothing is said as to how the mistake may be proven—whether it must appear upon the face of the award, or whether the arbitrators may come into court and prove it. We incline however to the opinion that the arbitrators may come into a court of equity and prove the mistake, but that it ought to be a mistake that does not result from the mere negligence of the losing party, but one that, by due diligence, he would not be able to discover.

In this case, it is complained that the land in question, or a portion of it, had been dedicated to a public street in the

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city of St. Louis, by a plat regularly made out and filed and recorded in the recorder's office of St. Louis county. This record and plat imparted notice to everybody, and it is the duty of every person interested to examine the records for title; and if he fails to do so, that it is his own fault, and he ought not to be relieved against it.

It is well settled that if the award be obtained by any fraudulent practice or suppression of evidence by the prevailing party, the defendant may plead and prove it in bar of an action to enforce the award. (2 Sto. Eq. § 1456; 2 Greenl. Ev. 78.) And the arbitrators may be examined to prove that no evidence was given on a particular subject, or that certain matters were or were not examined or acted on by them, or that there is a mistake in the award. (2 Greenl. Ev. 78.) But none of the authorities that we have been able to find go to the extent, that either courts of equity or courts of law will intervene to relieve those who have failed to relieve themselves. There is no evidence that the plaintiff had any more knowledge of the street than the defendant had. The means of information was the same for both, and both parties might equally avail themselves of it; but, having failed to do so heretofore, it is too late now.

Judgment affirmed. Judge Wagner concurs; Judge Holmes not sitting, having been of counsel.

HENRY PLOGSTART, Respondent, *v.* JACOB ROTHENBUCHER, Appellant.

Practice.—Judgment affirmed under the peculiar circumstances.

Appeal from St. Louis Law Commissioner's Court.

J. G. Woerner, for appellant.

Jecko & Hume, for respondent.

LOVELACE, Judge, delivered the opinion of the court.

The plaintiff brought suit before a justice of the peace for

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five dollars, and at the trial the justice rendered judgment against the defendant for the amount claimed, and costs, which the defendant immediately paid up. Afterwards the defendant prosecuted an appeal to the Law Commissioner's Court of St. Louis county, and the plaintiff then moved the court to dismiss the appeal, because the defendant had paid and satisfied the judgment rendered against him by the justice; and this motion was sustained by the court, and the case comes here by appeal.

We would not like to lay it down as a rule that the payment of a judgment so far cancels it that it cannot afterwards be appealed from, but the peculiar circumstances of this case may well be regarded as a confession of the correctness of the judgment of the justice, and the appeal was therefore properly dismissed.

Judgment affirmed. The other judges concur.

MUTUAL SAVINGS INSTITUTION, Respondent, *v.* CHARLES ENSLIN, Appellant.

Partnership—Dissolution.—After the dissolution of a partnership by mutual consent, one partner cannot bind the other by any new contracts in the name of the firm, nor can he transfer the title to any of the partnership securities. Either party may reduce the choses in action to possession, and use them for paying the liabilities of the firm. If, after the dissolution, one of the partners die, his administrator may reduce choses in action to possession, and apply the proceeds to payment of the debts of the firm.

Appeal from St. Louis Court of Common Pleas.

Taussig, for appellant.

I. The defendant, as administrator of the estate of Henry Golberg, was entitled to the possession of the note, and had a right to apply its proceeds to the payment of the debts of the firm of Koehls & Golberg.

II. Admitting, for the sake of argument, that the defendant was not legally entitled to the possession of the note, and

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that it was delivered to him by mistake, it appears that plaintiff acted with full knowledge of all facts, and therefore is not entitled to relief from a mistake of law. (Chit. Cont. 490-1; 2 Greenl. Ev. § 123, n. 8; Tyler v. Smith, 18 B. Mon. 793; Marietta v. Slocumb, 6 Ohio, n. s., 471; Snelson v. State, 16 Ind. 29; Bond v. Coats, 16 Ind. 202; 5 Taunt. 143; 9 Cow. 674; Brumaghin v. Tillinghast, 18 Cal. 165; Garrison v. Tillinghast, 18 Cal. 404.)

III. The plaintiff obtained no title to the note by the assignment of Bredow, made on the 14th of January, 1860. The plaintiff, finding it impossible to recover from the defendant money paid under a supposed mistake of law, undertakes to recover from the defendant as the assignee, under Bredow, of the note in question.

a. Nor would it help the plaintiff's case if it appeared from the evidence that he has a good cause of action, although different from the one set forth in his petition. (Link v. Vaughn, 17 Mo. 585; Butcher v. Death, 15 Mo. 271; Beck v. Ferrara, 19 Mo. 30; Payne v. Clark, 19 Mo. 152; Duncan v. Fisher, 18 Mo. 403; Perry v. Barrett, 18 Mo. 140.)

b. And the same rule applies, although the plaintiff and defendant agreed upon the facts in the case, the cause being submitted on the petition, answer and facts agreed upon. (Chouquette v. Barada, 23 Mo. 331.)

c. Bredow could not have sued the plaintiff for money had and received to his use because the plaintiff had refused to pay over to him. (Hall. v. Marston, 17 Mass. 560-3.) He had to sue for a wrongful conversion. The plaintiff now claims as assignee of Bredow, and stands in his shoes; hence it can no more sue for money had and received than Bredow could.

Submitted for respondent on brief formerly filed by *Judge Holmes.*

I. On the facts stated in the agreed case, it simply amounts to this: that defendant has collected the proceeds of a note, of which the plaintiff is the owner, and refuses, on demand

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made, to pay over the money. It is a clear case of money had and received to the plaintiff's use. (Chit. Contr. 606, & n. 1) No express privity of contract is necessary between plaintiff and defendant, nor is it material that in fact the defendant received the money with intent to appropriate it to his own purposes, supposing he had a right to do so ; it is enough that he has another's money, which he has not a right conscientiously to retain. (Mason v. Waite, 17 Mass. 560-3 ; Hall v. Marston, 17 Mass. 575-9.) No privity necessary, and the action may be maintained though the note be given up under a mistake, or "an unfounded belief of payment." Eagle Bk. v. Smith, 5 Conn. 71 ; Dickson v. Cunningham, Mar. & Yerg. 203-221 ; Ely v. Wolcott, 4 Allen, 506 — though acknowledged in a bill of sale to have been received.

II. It was decided in Bredow v. Mut. Sav. Inst., 28 Mo. 181, that Enslin, adm'r of Golberg, had no title to the note, or the proceeds.

LOVELACE, Judge, delivered the opinion of the court.

Plaintiff brought her action, for money had and received by defendant to the use of plaintiff, in the Court of Common Pleas of St. Louis county.

The evidence shows that one Heiderman executed his note to the firm of Keohls & Golberg, a mercantile firm in the city of St. Louis, for about the sum of four hundred and thirty dollars, due October 4, 1856 ; that for the purpose of securing a debt, which Keohls & Golberg owed to the Mutual Savings Institution, they deposited with the plaintiff this note, some time in July or August, 1856 ; that on the 27th of August, 1856, the partnership of Keohls & Golberg was dissolved by mutual consent, and due notice given ; that on the 7th day of September, and eleven days after the dissolution of the partnership, Golberg, one of the partners, died ; that on the 1st of December, Keohls, acting as surviving partner, by agent, made an assignment of the note to Bredow & Shaffner, and on the 2d December, Bredow & Shaffner demanded the note of the Mutual Savings Institution, which

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refused to give it up, upon the ground that the debt to secure which it was deposited was not yet paid.

About the first of January, 1857, Enslin, the defendant, was appointed administrator of the estate of Golberg, deceased, and about the first of February demanded the note of the institution, the indebtedness of Keohls & Golberg having been paid off. Plaintiff at that time had sent the note to the Central Bank of Peoria, Ills., for collection, and therefore gave defendant Enslin an order on that bank for the note, or its proceeds, in case it had been collected; and the defendant took the order, and collected the proceeds on the 11th July, 1857.

On the 15th January, 1857, Bredow & Shaffner assigned their interest in the note to Theo. Bredow, and at the March term, 1858, of the St. Louis Court of Common Pleas, Theo. Bredow commenced suit against the plaintiff for unlawfully converting the note to its own use, and on the 4th of January, 1860, recovered judgment.

Plaintiff then paid off the judgment, and took Bredow's assignment of his title to the note and proceeds, and this suit is brought to recover of Enslin the proceeds of said note, collected by him from the Central Bank of Peoria.

So soon as the partnership between Keohls and Golberg was dissolved by consent of the partners, the partners at once became tenants in common of the partnership effects, and after such dissolution the death of one of the partners would neither enlarge nor restrict the powers of the other; so that Keohl's powers remained the same after the death of Golberg as before, until the partnership effects were taken out of his hands by proper authority.

It is well settled, that the partners after dissolution cannot bind each other by any new contracts made in the name of the firm. (Coll. Partn. § 546; Bredow v. Mut. Sav. Ins. 28 Mo. 181.) Their power to act for each other has ceased. They may, however, reduce choses in action to possession, and use them for the payment of the liabilities of the firm. It was held by this court, in Bredow v. Mut. Sav. Inst., that

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"one of the partners, after dissolution, without the consent of the others, cannot transfer the title to any of the partnership securities." "The reason of this," say the court, "is not simply because one partner, after dissolution, cannot by his endorsement of a note create a new liability binding upon the others, but because, only having an undivided interest in a partnership note, he cannot, without the consent of the other partners, transfer the title to the whole of it."

It would seem, then, that Keohls, after the dissolution of the partnership, had no power to make a transfer of the note in question ; and his attempted transfer to Bredow & Shaffner in no way interfered with Enslin's right to receive the note, or the proceeds thereof, and apply it to the payment of the partnership debts, which the record shows he did, under order of the probate court.

The difficulty in the case seems to be, that the court below regarded it as a case of a dissolution of a partnership by the death of one of the partners ; in which case Keohl's right to transfer the note, for the purpose of settling the business of the partnership, would be unquestionable. But the record shows that the partnership had been dissolved by mutual consent, and due notice given, eleven days before the death of Golberg. Then how could his death affect the rights or powers of the other partners ? The same error seems to have been committed in the case of *Bredow v. Mut. Sav. Institution*. After laying down the law applicable to the dissolution of a partnership by consent of partners, and also the law applicable to the dissolution of partnership by the death of one of the partners, Judge Richardson says : "Upon the death of Golberg, the title to the partnership notes vested in Keohls as surviving partner," showing clearly that he understood it to be a dissolution of partnership by death.

Enslin, then, as administrator of Golberg, was at least a tenant in common with Keohls, or his assignee, and had an equal right, if he had no better, to reduce the note to possession, and collect it, and apply it to the payment of the partnership debts ; and for doing that he is not liable.

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Several other points are made in the case, but in the view we have taken they become immaterial, and will not be noticed.

Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Holmes not sitting, having been of counsel.



CHARLES T. LARNED AND PHILOMENA LARNED, HIS WIFE, Appellants, v. WILLIAM RENSHAW, JR., Respondent.

Partition—Guardians and Curators.—Infants interested in lands may join as parties plaintiff, by their curator, in seeking a partition; and when all the owners of the land agree, they may all join as plaintiffs in seeking a partition *ex parte*. (*Thornton v. Thornton*, 27 Mo. 303, and *Waugh v. Blumenthal*, 28 Mo. 462, approved.)—Larned v. Whitehill, S. P., affirmed.

Appeal from the St. Louis Land Court.

Broadhead, for appellants.

The proceeding in partition was void. This was a proceeding under the act of 1835, R. C., similar to the provisions of the present law. The parties interested all joined; there was but one attorney for all; the three minors appear by their curator Beckwith. This was no suit, not even a proceeding in partition. Our Supreme Court has decided, in case of *Waugh v. Blumenthal*, 28 Mo. 462, that the proceeding in partition is *sui generis*; not a suit, but a proceeding, and that it may be *ex parte*. But we contend that it must be by parties competent to act in their own right, and infants cannot join in partition. (*Johnson v. Noble*, 24 Mo. 252.) The statute of 1835, however, under which this proceeding was had, does not give the right to sue by curator, but by guardian. (R. C. 1835, p. 426, § 36.) This right to sue by curator was never given till 1857 (Sess. Acts, p. 83). The person of the party must be in court; the guardian represents the person, the curator the property.

Krum & Decker, for respondent.

I. This court decided, in the case of *Thornton et al. v.*

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Thornton, 27 Mo. 303, that infants may be made parties plaintiff in statutory proceedings in partition. The case now at bar is within the rule and principle decided in Thornton et al. v. Thornton. If the rule in that case is adhered to, its dispose of the question in this case.

In support of the rule laid down in the case quoted, we submit the following rules from elementary writers, and also a series of adjudications made in analogous cases, viz:

Coparcenary is not distinguishable from tenancy in common in U. S.—4 Kent, 367.

In equity, an infant could be plaintiff and be as much bound as an adult—Allnott, 104.

Parceners at common law could make partition by parol—Allnott, 125.

But under American law, and under our own statute, tenants in common and joint tenants may be compelled. There is no real difference between coparcenary and tenancy in common under American law—4 Kent, 367, & ante.

Such partition by guardian, or curator, will bind if equal—Allnott, 29.

II. The proceedings in partition were not void—5 Ohio, 243; 4 Ills. 104; 5 Ills. 364; 4 Dana, 429; 14 Ohio, 228; 5 Ohio, 243; Swan, Ohio Stat. 593.

Our Supreme Court does not decide them to be void either in 24 Mo. 252, or *id.* 385.

If not void, they are conclusive of the rights of parties in this case—8 Metc. 596; 8 N. H. 393; 4 Ills. 104; 5 Ills. 364; 4 Dana, 429; Allnott, 27, 28; Co. Litt. 171.

WAGNER, Judge, delivered the opinion of the court.

The only question presented by the record in this case is, whether the proceedings and judgment in the partition suit of Thomas F. Smith and his infant children were valid and binding. No other question was raised in the court below by the instructions of the appellants, and nothing else was passed on, and that alone will be reviewed here.

The proceedings in partition were had under the provis-

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ions of the revised statute of 1835, which is in substance similar to the present law. The petition was signed by Smith in his own proper person, and the minors appeared by their curator, Beckwith. They all joined as plaintiffs, and the whole proceeding was *ex parte*.

It is contended by the counsel for appellants, that, the parties being all plaintiffs, there was no suit; that although an action for partition may be *ex parte*, yet it must be by parties competent to act in their own right, and that infants cannot voluntarily join; that the person of the party must be in court, and that the guardian represents the person, the curator the property; and that the statute of 1835 does not give the right to sue by curator, but by guardian.

The distinction here taken between guardian and curator, we think, is more artificial than real, when applied to the question involved in this case. Undoubtedly there is a line of demarkation existing between them, and they perform separate functions; they may respectively be committed to different persons, though both are frequently joined in the same individual. A curator is a person who has been legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself. In the civil law, the term curator is employed for guardian, but by the common law a guardian is one who has been lawfully invested with the care of the person of an infant. Both are the representatives of their interest. By the R. C. of 1835 it is provided that "all guardians and curators shall be allowed to prosecute and defend for the minors, in all matters committed to the care of such guardians and curators, respectively, without further admittance, in the several courts of this State," and this provision has been incorporated in all the subsequent revisions. It is true, by the 36th section of the act concerning partition, in the Laws of 1835, the term "guardians" is alone used, where an authorization is expressed, empowering them to appear on behalf of their wards, to do and perform any matter or thing re-

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specting the division of lands, tenements, or hereditaments, which shall be deemed as valid as if the same had been done by the ward, after his disabilities had been removed.

But after the decision in this court in *Johnson v. Noble*, holding that an infant could not be a party plaintiff in a statutory proceeding for partition, the Legislature passed an act providing that "when any minor is interested in any real estate in which there are other parties holding undivided interests, it shall be lawful for the guardian, or *curator*, of such minor to file a petition for the division and partition of such real estate" (Sess. Acts 1856-7, p. 83); and Judge Richardson, commenting on this act, said: "We think that this legislation was unnecessary, and that it is not to be inferred from it that the right it expressly gives did not exist before, but the object was to put at rest any doubt on the subject. (*Thornton v. Thornton*, 27 Mo. 302.)

No doubt seemed to be entertained whatever by the court about guardians and curators having the same powers, and standing on the same foundation, as regards their appearance in court in partition cases, and this we believe has been the general opinion of the profession. The right of the infant to appear by guardian or curator was never questioned, so far as we are advised, till the decision of Judge Scott in *Johnson v. Noble*, 24 Mo. 252, denying that an infant could be a party plaintiff. Again, it was decided by the same learned judge, in *Bompart v. Roderman*, 24 Mo. 385, that the law in relation to partition did not authorize the joinder of all the parties in interest as parties plaintiff to the petition; that there should be a party defendant as well as a party plaintiff, otherwise the proceedings would not be a suit for partition, under the law; and being unauthorized, would be null and void as a judicial proceeding. But both of the above cases, *Johnson v. Noble* and *Bompart v. Roderman*, were overruled in this court by the cases of *Thornton v. Thornton*, *ubi supra*, and *Waugh v. Blumenthal*, 28 Mo. 462. It is noticeable, however, that neither of the foregoing cases was concurred in by a full bench. In the two former, Justice Ryland con-

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curred in the opinions delivered by Judge Scott, and Leonard, J., was absent; whilst in the two latter, Judge Napton concurred in the opinions of Judge Richardson, and Scott dissented.

The proceeding in this State for partition is strictly statutory, and cannot be governed by the technical rules regulating actions at law. The first section of the code of 1835 (and it is the same by the codes of 1845 and 1855) enacts, that where any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common, or coparcenary, it shall be lawful for any one or more of the parties interested therein to present a petition to the Circuit Court of the county wherein such lands, tenements or hereditaments lie, for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice. And in subsequent sections ample provision is made for bringing in parties interested as defendants, where they did not join, or their consent could not be procured as plaintiffs. The plain, obvious, and intelligible meaning of the act is, that persons interested may be parties as petitioners. And where they all are competent to act, and are desirous of a division, no reasonable objection can be urged for this course of procedure. They voluntarily come into court, and submit themselves to its judgments; their rights and interests are regularly adjudicated by due course of law, and we are unable to perceive that any grievance or injustice can result therefrom.

The law concerning proceedings in partition, and the titles acquired under judgments rendered thereon, ought not to be doubtful or unsettled. The law and practice of the courts, it is believed, have been uniform throughout the State, as to joining infants as plaintiffs, and conducting the suits *ex parte*, where all the parties interested acquiesced and voluntarily came within the jurisdiction of the court. This practice has become firmly imbedded in the judicial annals of the State, and may be considered as a settled rule

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of property. On the strength of it, immense amounts of property have been acquired in good faith, and to hold this practice and these proceedings void, would be productive of irreparable mischief. We are entirely satisfied with the reasoning and the decisions in the cases of Thornton v. Thornton and Waugh v. Blumenthal.

The judgment is affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, *v.* HENRY GRAY, Appellant.

1. *Crimes—Larceny.*—Larceny is the wrongful or fraudulent taking and carrying away of the personal property of another, from any place, with a felonious intent to convert the same to the taker's use, and make it his own, without consent of the owner.
2. *Crimes—Larceny—Evidence.*—The possession of stolen property recently after its loss, is presumptive evidence of guilty possession, and if unexplained by attending circumstances, or the character of the possessor or otherwise, is taken as conclusive.
3. *Criminal Practice—Counts.*—It is within the discretion of the court to compel the prosecutor to elect upon which of several counts he will submit the cause to the jury.

Appeal from St. Louis Criminal Court.

W. H. Lackland, for appellant.

Jos. P. Vastine, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The first error complained of by the appellant is that the court wrongly instructed the jury as to what constituted larceny. East, in his Pleas of the Crown, defines larceny to be the wrongful or fraudulent taking or carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner. Bishop says, it is the taking and removing, by trespass, of personal property, known to belong either generally or specially to another, with the intent to deprive

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him of such general or special ownership therein (1 Cr. L. § 419); and Blackstone (4 Com. 230) declares it to be the felonious taking and carrying away of the personal goods of another.

The statutory definition is, that every person who shall be convicted of feloniously stealing, taking, and carrying away, any money, goods, right in action, or other personal property, or valuable thing, &c., belonging to another, shall be deemed guilty of larceny. (R. C. 1855, p. 575, § 25.)

The court instructed the jury that larceny was the wrongful or fraudulent taking and carrying away by any person of the mere personal property of another, from any place, with a felonious intent to convert the same to his (the taker's) own use, and make it his own property, without the consent of the owner. This is in almost the identical language of East, and in substantial compliance with the statute.

The next point insisted on is, that the court erred in refusing to compel the State to elect on which count in the indictment a conviction was sought. The practice is well settled and firmly established in this State, that a motion to compel the prosecutor to elect the count on which the trial shall be had, is always addressed to the discretion of the court, and this court will not interfere with the exercise of this discretion, unless it is manifest that it has been abused to the obvious and palpable detriment of the accused. It is often indispensably necessary to include several counts in the same indictment, to meet the proofs which may be given on the trial; and to arbitrarily compel an election in all instances, would tend to cripple prosecutions and defeat the ends of justice. (State v. Jackson, 17 Mo. 544; State v. Leonard, 22 Mo. 449.)

In *The People v. Baker*, the prisoner was convicted of receiving stolen goods. The indictment contained three counts, each charging a felony. The first count was for receiving stolen goods, the second for burglary, and the third for grand larceny. At the trial, the defendant's counsel moved that the district attorney be compelled to elect whether he would

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proceed upon the count for receiving stolen goods, or upon the others. The court overruled the motion, and, on error brought, the Supreme Court sustained the decision, and declared that it was in the discretion of the court below, and not a question to be reviewed. (3 Hill, 159.)

In the case here, the indictment contained two counts; one for grand larceny, the other for receiving stolen goods. No evidence was given as far as one of the counts was concerned, and the ruling of the court could in nowise operate to the injury or prejudice of the prisoner.

The instruction of the court, that where property has been stolen and recently thereafter the same is found in possession of a party, it is incumbent on him to account for such possession in a manner consistent with his innocence, or rebut the presumption of guilt arising by reason of such recent possession; and until he so accounts for such possession, or so rebuts such presumption, the law presumes he is the thief, was a correct proposition of law, and fully justified by the evidence in the case.

The possession of the fruits of crime recently after its commission, is *prima facie* evidence of guilty possession, and if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive. (1 Greenl. Ev. § 34.) And the strength and character of this presumption will depend very much on the kind and description of the property, when considering the recent possession and all the various circumstances surrounding the case. (State v. Bruin, 34 Mo. 537.)

Judgment affirmed. The other judges concur.

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STATE OF MISSOURI, Respondent, *v.* HENRY C. GREEN, Appellant.

1. *Crimes—Murder.*—If the killing be done of preconceived anger and malice, although in mutual combat, it will be deliberate and premeditated murder.
2. *Criminal Practice—Sunday.*—From 12 o'clock on Saturday night until 12 o'clock on Sunday night, no court can transact any business except to receive a verdict or discharge a jury. (R. C. 1855, p. 542, § 64.) The civil day Sunday is *dies non iuridicus*.

Appeal from the St. Louis Criminal Court.

Mortell, for appellant.

The court erred in refusing to allow defendant to prove that Josephine Cissna, the witness, was an inmate of a bawdy-house for the last seven years, and that she was then the inmate of a bawdy-house.

This inquiry bore directly upon the present character and moral principles of the witness, and was therefore essential to the due estimation of her testimony by the jury. Learned judges have been disposed to allow it. (R. C. § 2, p. 1577; 13 Mo. 236-442; 14 Mass. 387; 2 Stark. Ev. 369, with note; 1 Greenl. § 459; State v. Mattier, 4 Wend. 257-8; Phil. & Ames on Ev. 925; 4 Esp. 104, 1 Phil. & Ames, 293; 2 Dev. Law R. 209-10; 1 Stark. 182; 10 Ves. 50; Anon. 1 Hill, S. C. 251, 258; Eaken v. Brown, 1 E. D. Smith, 37; 2 Wieb, N. Y. Pr. 607.)

The last and most important question to be determined by this court is, whether a trial commenced on Wednesday, and progressing from day to day, shall be concluded on Sunday.

The 64th sec., R. C. 1855, p. 542, declares, that "no court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury, and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as shall be made after a cause has been committed to the jury."

If the court could sit and hear causes five minutes after

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the time prohibited, why not an hour or more? Where will be the limit? Can it find an apology in plea of expediency? Then why may they not sit the whole day? The law sets a limit to judicial as well as human action, beyond which they cannot step, nor incur its displeasure. No judge of ordinary learning could sit or hear civil or criminal cases on Sunday, even by consent of parties, in violation of the positive injunction of the statute. The omission to order the judge to stop reading or charging a jury, on a day prohibited, gives the proceedings no validity. The proceedings are void; anything done contrary to statute is void. (1 Bish. Cr. L. §§ 150-3; Smith's Stat. & Const. L. § 677.) The man whose life is sought ought to be tried by the law of the land. (27 Mo. 589.)

HOLMES, Judge, delivered the opinion of the court.

This is an appeal from the St. Louis Criminal Court, in which the defendant was indicted, tried and convicted of murder in the first degree. There was evidence in the case tending strongly to show that the immediate occasion on which the homicide took place was not altogether sudden, but was the result of preconceived anger and malice. In such case, if the killing be done in malice, though in mutual combat, it will be deliberate and premeditated murder. (1 Russ. Cr. 527.) There was also some evidence that the deceased, during high words between the parties, slid his hand down into his side pocket and drew out a knife, which he had carried concealed in his sleeve, before the defendant drew his pistol and fired. The court instructed the jury very fully upon both these aspects of the case.

We have carefully reviewed the instructions with reference to the whole evidence. In those relating to the crime of murder in the first degree, as charged in the indictment, we find nothing which can admit of serious doubt or question; and those which were given upon justifiable homicide, or self-defence, laid down the law upon the case made by the evidence as favorably for the defendant as the well-settled

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doctrines of the law would allow. (Wharton on Hom. 214, 230.) We see no occasion to go into any discussion of the subject further here. The questions of fact were fairly submitted to the determination of the jury. The instructions refused for the defendant were substantially contained in those already given by the court.

Some exceptions were taken to the exclusion of testimony bearing on the moral character of one of the witnesses for the State, by way of impeaching her credibility ; but even on this the rulings of the court went to the furthest extreme of any authority in favor of the defendant. (1 Greenl. Ev. § 461 and notes.) Moreover, ample evidence was in fact admitted, upon proper questions, to establish all that the defendant proposed to prove by the excluded testimony, namely, that the general moral character of the witness was bad, and that she was not to be believed under oath. When this fact is already shown in proof, even the exclusion of a record of conviction of keeping a bawdy-house has been held not to be error. (Deer v. State, 14 Mo. 348.)

Exception was taken to the refusal of the court to grant a new trial, first, on the ground of newly discovered evidence, supported by the affidavit of the witness, stating what he could testify. This evidence could hardly be considered as sufficiently material and important to warrant us in interfering with the decision of the court below, on that ground alone. The second ground was, that the reading of the instructions to the jury by the court had not been concluded, nor the cause finally submitted to the jury, until the clock in the court room showed ten minutes after twelve, midnight, on Saturday, when the court took a recess, without adjournment, until two o'clock on Sunday morning, and then received the verdict and discharged the jury. These facts are distinctly stated in the bill of exceptions, signed by the judge, and they are verified by the affidavits of several persons, which are filed with the motion. The statute expressly declares, that "no court shall be open, or transact business on Sunday, unless it be for the purpose of receiving a

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verdict or discharging a jury," and that "every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury." (R. C. 1855, p. 542, § 64.) Here is a positive statute prohibition of the sitting of the court on Sunday for any other purpose than that of receiving a verdict and discharging a jury. If the cause has been committed to the jury on Saturday, the court may adjourn to Sunday for that purpose only. When does Saturday end and Sunday begin? At common law the natural and civil day consists of twenty-four hours, from midnight to midnight, and the artificial or solar day extends from sunrise to sunset. (Co. Litt. 135, o.) The Sabbath or Lord's day, as one of the *dies fasti*, having its origin in the Christian Church, has sometimes been held to mean, both at common law and under the statutes of some of the States, the artificial or solar day, extending from morning light to the setting sun. (Co. Litt. 135; Keilw. 75; Fox v. Abel, 2 Conn. 541; Hiller v. English, 4 Strobh. 486.) In Hiller v. English the whole subject is examined at length and with much learning. In some States the express language of the statutes has defined the limits of the day intended. In Connecticut, a statute naming "the Lord's day" only, was held by a majority of the judges to refer to the artificial or solar day, between morning light and sunset (2 Conn. 541); but in New Hampshire, a statute prohibition "on the first day of the week, commonly called the Lord's day, or any part thereof," was held to extend from midnight on Saturday until midnight on Sunday. (Shaw v. Dodge, 5 N. H. 462.) In our statute there is no language of definition but the simple word *Sunday*. Sunday is the name of the civil day, and it does not necessarily refer to the Christian festival or Lord's day. The Constitution of this State provides, that "the Governor shall sign a bill within ten days after it is presented to him, Sundays excepted." (Art. 5, sec. 9.) Here it is plain that Sunday is one whole civil day, like the other six; and a similar clause in the old Constitution was

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said to be a recognition of Sunday as a day of rest. (State v. Combs, 20 Mo. 217.) As such, it is placed on merely civil grounds. The common law maxim, *Dies Dominicus non est dies juridicus*, as a day consecrated to divine service, according to Coke, is nevertheless based on reasons looking to the civil government as well as to divine service or public worship, as good for rest and relaxation, and as serviceable to the State as a civil institution. (Broom. Max. 10; 4 Black. Com. 63.) The statute prohibitions of certain kinds of work and labor, games, selling goods, keeping groceries, tippling-shops, and the like, as misdemeanors, define the day as "the first day of the week, commonly called Sunday." (R. C. 1855, p. 631, §§ 33-6.) As including one-seventh part of the whole week, this can scarcely be supposed to mean less than the whole civil day, from midnight to midnight. Nor do we see any good grounds on which Sunday, as named in the act in question here, can be interpreted to mean anything else than the same civil day. Lord Coke informs us that the natural day of twenty-four hours, comprising the solar day and the following night, and extending from sunrise to sunrise, was recognized by the laws of England in certain cases; the artificial or solar day, from sunrise to sunset, in certain other cases; and in many cases, the Egyptian and Roman civil day of twenty-four hours, from midnight to midnight. (Co. Litt. 135.) This last must be taken to be the civil day of our law, where no other limitation is expressly or impliedly defined. At common law, *dies juridici* were within the four terms only; and the Sabbath, or Lord's day, though it were in term, was *dies non juridicus*, and a day on which no judicial act could be done. Before the Stat. 29, Car. II., and so before the fourth year of James I., all ministerial acts on Sunday were lawful, though judicial acts were not. Yet the Court of Chancery was always open, and the Court of Exchequer, as well as Parliament, could sit on Sunday, and any other court might adjourn on a day *non juridicus*, but an award of process, or the entry of a judgment was void. (6 Com. Dig. 331-3, *Temps*, B. 3, C. 1, 5; Broome's Max. 19;

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Swan vs. Broome, 3 Burr. 1595; Story v. Elliott, 8 Cow, 27; Butler v. Kelsey, 15 J. R. 177; Pulling v. People, 8 Barb. 384.) Our statute declares that no court shall be open or transact any business on Sunday, unless it be an adjournment to Sunday for the purpose of receiving a verdict and discharging a jury. It supposes that in such case the cause has been committed to the jury on Saturday before 12 o'clock, midnight; or if it has not, then the adjournment must be to some other day than Sunday. However it may have been at common law, there can be no doubt that, under this statute, the sitting of the court, the giving of instructions and the submitting of the cause to the jury, were prohibited, whether they were strictly judicial or merely ministerial acts. In Pulling v. People, (8 Barb. 384,) a case of petit larceny was submitted to the jury at 2 o'clock on the morning of Sunday, the verdict was received at 3 o'clock, and the conviction was held to be erroneous, under the statute of New York, of which ours is an exact copy. The same conclusion has been arrived at in other States, on similar states of facts, in a variety of cases, and mainly on common law principles, where no such statute existed. (Arthur v. Mosby, 2 Bibb, 589; Chapman v. State, 5 Blackf. 111; Nabors v. State, 6 Ala. 200; Baxter v. People, 8 Ills. 384; 1 Jones, N. C. 122.) In some other States a similar proceeding on Sunday has been sustained, in the absence of any express statute prohibition, on the plea of necessity or common usage, and as not interfering with the religious festival of Lord's day, which was considered as limited to the artificial solar day. (Van Risser v. Van Risser, 1 South. N. J. 156; Huidekesser v. Cotton, 3 Watts, 56; Johnson v. Day, 17 Piek. 106; Hiller v. English, 4 Stroth. 486.) Cases may be imagined in which it might be difficult to determine the exact hour of midnight if the matter were to be considered with metaphysical nicety, or it might be doubtful by what clock the court was to be governed, or how far it might come within the province of the court to determine the hour. It is better that all such questions should be clearly avoided.

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Here the fact appears by the record, that the court did sit and perform judicial functions after midnight. We have felt some hesitation about reversing a conviction otherwise legal, on so small a matter as ten minutes' time. The maxim *de minimis non curat lex* cannot be applied to such a case. The rule must be defined; the line must be drawn somewhere. The day must be held to begin either at midnight, or at sunrise; and both principle and authority concur in fixing it at midnight. If the hour can be exceeded by ten minutes, it may by an hour, or twelve hours. Such irregularities and void proceedings have been held to make the final judgment erroneous, and in many similar cases new trials have been granted.

The judgment will be reversed, and the cause remanded for a new trial. The other judges concur.

JOHN WANN, Respondent, *v.* THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

Bailments—Carriers.—Telegraph companies, whether regarded as common carriers or bailees, may specially limit their liabilities, subject to the qualification that they will not be protected from the consequences of gross carelessness. A telegraph company may reasonably require that, for the purpose of avoiding errors, the message shall be repeated, or that the company shall not be liable for any error in the transmission of the message.

Appeal from St. Louis Court of Common Pleas.

This action was instituted to recover damages for alleged carelessness of the Western Union Telegraph Company in transmitting a dispatch for plaintiff, from St. Louis to New York city. It was admitted on the record that the defendant was a duly incorporated company, doing business under the "Act concerning telegraph companies" (R. C. 1855, ch. 156). The answer denies carelessness on the part of defendant, and sets up a failure of the plaintiff in complying with the published regulations of the company, which, among other things, require the sender of an important message to

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pay an additional price of one-half the usual rates for repeating the same. The answer also sets out the published regulations of the company, and charges that the plaintiff had full knowledge of said regulations, and contracted with reference to the same.

Plaintiff's knowledge of these regulations was admitted on the trial.

On the day previous to the transmission of the message in question, Messrs. McAndrew and Wann, of New York, telegraphed the plaintiff as follows:

“SEPTEMBER 17, 1862.

“Shall we forward salt by steam or sail on Lake? Can buy same quantity of each in time. Not much change in freight since you were here. Reply at once.

(Signed) MCANDREW & WANN.”

In reply, the plaintiff sent the dispatch in question, to-wit :

“ST. LOUIS, September 18, 1862.

“Ship by sail immediately. Take 5,000 Liverpool, three thousand Turk's Island.

(Signed) JOHN WANN.”

When this dispatch reached McAndrew & Wann in New York, it read : “Ship by rail immediately,” etc. That is, the word “rail” was substituted for the word “sail” in the original dispatch.

On the following day, McAndrew and Wann telegraphed plaintiff as follows :

“SEPTEMBER 19, 1862.

“Have bought 5,000 Liverpool, one twelve half and three thousand Turk's. About 75 four months, forwarding by rail to Chicago.

(Signed) MCANDREW & WANN.”

Five days after this last dispatch, plaintiff telegraphed McAndrew & Wann as follows :

“ST. LOUIS, September 24, 1862.

“Don't ship any salt by railroad and steam, only canal and lake.

(Signed) JOHN WANN.”

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The only evidence introduced, on the trial, to sustain the charge of carelessness of the company was, that, in the message as delivered in New York, the word "rail" was substituted in the place of the word "sail" in the original one. On the other hand, it was in evidence that the plaintiff did not reply to the dispatch of McAndrew & Wann of the 19th September, advising him of the shipment "*by rail to Chicago*," until the 24th September, and that plaintiff's dispatch of the 18th September (the one in question) was not properly responsive to the question of his correspondents in New York—"Shall we forward by *steam or sail on Lake?*" The defendant proved by experts, that the telegraph apparatus used by the company in transmitting the dispatch was in complete order; that the system used by said company was the one known as Morse's system, and the most perfect in use, and that the employees of the company who acted as operators were skilful and experienced.

It was admitted as proved that the ordinary price for said dispatch to New York, (\$1.92,) was paid on delivery, but not the additional price for repeating the dispatch (which would be 96 cents additional).

The main question in the case arose on instructions given and refused. The one given at the instance of the plaintiff is as follows :

"The jury are instructed that defendants are responsible as common carriers, for any negligence or carelessness in copying or transmitting the plaintiff's message, and are responsible for such damages as plaintiff may have suffered, if any, by reason of defendants having carelessly or negligently transmitted such message, and the defendants are not excused from their said responsibility though the plaintiff may have had notice of the terms claimed by the defendants, as set forth on the tops of the papers used by them in the writing and sending of dispatches."

The defendants' instructions, being the converse of this, were refused.

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The jury found for the plaintiff, and judgment was rendered against defendants for \$1,085.44.

Knight, for appellant.

I. The court below clearly erred in declaring the law. The defendant was not a common carrier, or liable as such. Telegraph companies come neither within the *terms* or meaning of the rule. They carry no *goods*. They have no lien for freight; they have possession of nothing which they can convert to their own use. They have no means of ascertaining the value of the dispatch, or whether it has any value or not. It may have no general value, and still have great value to the parties interested. It may be in cypher and unintelligible to the employees of the company, and yet be worth a million to the parties. They have no right to demand a disclosure of its nature or importance. They have none of the *general* rights of carriers.. (Jones on Bail., App. p. 24 et seq.; Edw. on Bail. 353; Sto. on Bail. § 15, pp. 566-7.)

They are not *eo nomine* classed among bailees of that description. The contract *locatio operis mercium vehendarum* cannot in the nature of the case appertain to them. (2 Kent, 599.)

The language of all the books unites in describing the common carrier as one who carries *goods*, and has the custody of goods; has a special interest in the goods carried; has a lien on the goods for freight, and may sell the goods to satisfy his lien. (Chit. on Car. 15.)

In consideration of these peculiar rights, he was originally held to the strictest account, even as an *insurer* against inevitable accident. (1 Term, 33; 4 Dougl. 287; 3 Esp. 131.)

More modern cases have relaxed the rule so far, that it has been said they have unsettled the law on the subject. (Walk. Am. Law, 453 & note; 1 Am. L. Reg., 65 et seq.; 4 Sandf. R. 136.)

Courts have not only relaxed the rule, but have restricted it in its application. Hence the better opinion seems to be, "that the strict rule of the common law liability being harsh,

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courts will not extend the rule when the reason for it has failed." (2 Peters, S. C. 150.) Hence it does not extend to carrying passengers (*ibid*) ; nor to carrying baggage beyond an ordinary amount (9 Wend. 85) ; nor to express companies (19 Barb. 577 ; 5 Sandf. R. 180 ; 18 Barb. 500 ; 24 Barb. 533 ; 2 Duer, 471) ; nor to wharfingers (7 Cow. 497) ; nor to forwarders (6 Hill, N. Y. R. 158 ; 4 Dumf. & East, 583 ; 8 Cow. 223 ; 2 Smith [E. D.] 195 ; 12 Johns. 232.)

So we find, so far as the subject has undergone direct judicial investigation, the weight of authority is largely against applying the common carrier liability to telegraph companies. (Birney v. York & W. P. Tel. Co., 18 Md. 341, [1862] ; Camp v. W. U. Tel. Co., 1 Metcalf, R. 164 ; Shields v. Wash. Tel. Co., 9 W. Law Jour. 283 ; McAndrew v. Electric Tel. Co., 33 Eng. L. & Eq. 180 ; Drybuy v. N. Y. & W. P. Tel. Co., 35 Penn. 298.)

This last case was one based on the *misfeasance* of an agent of the company and not strictly in point, but Judge Woodward, in delivering the opinion, cites the Camp case (1 Metc. R. 164), and distinguishes it from the case before him, and without dissenting from the doctrine of that case, holds this language : "Though telegraph companies are not, like *carriers*, *insurers* for the safe delivery of what is entrusted to them, their obligations, so far as they reach, spring from the same sources—the public nature of their employment, and the contract under which the particular duty is assumed."

[a.] The only adjudicated case directly holding telegraph companies liable as common carriers, it is believed, is the case of Parks v. Alta Cal. Tel. Co. (13 Cal. R. 422.) This case was decided in 1859, and has no reference to previous adjudications—nor does it seem to be well considered. No reference appears to have been made to the Cal. statute on the subject, either by counsel or court.

On the other hand, both the Birney (Md.) and the Camp (Ky.) cases appear to have been ably argued by counsel, and well considered by the courts. The English authority above

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cited (33 Eng. L. & Eq. 180) has reference mainly to the construction of the statute (16 & 17 Vic. C. 103) which required the telegraph company to "receive and send messages, subject to reasonable regulations to be adopted by the company;" and the question in that case was, whether the regulations of the company were reasonable. The court decided in the affirmative. In arriving at that conclusion, the several judges compared the liability of telegraph companies to that of common carriers, and asserted that even common carriers might limit their liability by reasonable regulations. Our statute is *in terms* more favorable to the company than the English statute. It requires the company "to receive and transmit" only upon payment or tender of the usual charge, according to the regulations of the company." (R. C. 1855, p. 156.)

[b.] In a recent Canadian case, it was held that the telegraph company was not liable for transmission of a message beyond their line, although they had received payment therefor, on the ground that they had limited their liability by notice. (Stevenson v. Montreal Tel. Co., 16 Upper Can. 530.)

[c.] In another case, it was held that the same company were not liable to damages for failure to deliver a message to another company to be forwarded, for the purpose of accepting a proposed contract, on the ground that no legal contract could be created in that way. (Kinghorne v. Montreal Tel. Co., 18 U. C. 67.) If contracts can be created in this way, they are certainly distinguishable from those made by mail (Trevor v. Wood, 41 Barb. 255.)

[d.] It has long since been held that the carrier of the mails is not liable as a common carrier. And as it was said by the eminent judges in the celebrated postoffice case of Lane v. Cotton (1 Salk. 17), that "its office is for intelligence and not for insurance"; so we say of the telegraph, "its office is for *intelligence* and not for *insurance*."

II. But the court below clearly erred in assuming, in the instruction given, that the defendant could not limit its liability, and by refusing the instructions moved by the de-

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fendant on this point. The law is now well settled that even a carrier may limit his liability, either by express contract or notice brought home to the party. (3 How., 344; Ang. Com. Car. 223 et seq.; Edw. on Bail. 472-83; 4 Sandf. 136; 6 Barb. 344; 9 Wend. 85; 23 Vt. 206; Walk. Am. Law, § 182, p. 453, & note 3; 2 Comst. 210; 9 Barb. 191.) The doctrine of these cases can no longer be successfully controverted.

III. The court below erred in assessing the damages at \$1,085.44.

The proper rule of damages in such cases is, "that only such damages are recoverable as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as a probable result of the breach of it." (Hadley v. Baxendale, 9 Exch. R. 341; Griffin v. Colver, 2 Smith, 16 N. Y. 489.) As there was no disclosure in this case of the nature or importance of the message, the only damages that could reasonably have entered into the contemplation of both parties at the time of the contract was the amount paid for its transmission. (Landsberger v. Magnetic Tel. Co., 32 Barb. 532; Shields v. Wash. Tel. Co., 9 W. Law Jour. 283.)

IV. The court below erred in refusing the second instruction moved by defendant. There was evidence of *laches* on the part of the plaintiff: 1. In not sending an intelligible reply, *responsive* to the inquiry of his correspondents at New York; 2. In not replying at once to the telegram of his correspondents, dated September 19, advising him of their "having forwarded by rail to Chicago." This he failed to do until September 24. There is no law better settled than that if the plaintiff's negligences contributed to the injury complained of, he cannot recover. (2 Taunt. 314; 4 Car. & Payne, 554; 34 Mo. 55.)

If the appellant is to be held as an *insurer*, as is contended by the opposing counsel, the company will of course be forced, in self-defence, to charge the additional rate of insurance in *all* cases, whether the message be one of importance or not.

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This burden, then, will fall on the public at large, instead of falling where it should, to-wit, on him who sends an important message. While, therefore, the settling of the question involved, on sound principles of law, is important to the appellant, it is of still greater importance to the general public.

Hill & Jewett, for respondent.

From the three instructions given to the jury, it appears that the question was put distinctly to the jury, upon the ground that the defendants were guilty of negligence and carelessness, or want of ordinary care and diligence in transmitting the message. There is no question of "limitation of liability," or "terms," in the case. In their "terms," the defendants do not undertake to exempt themselves from the responsibility of ordinary care. They only say they will not be responsible for mistakes; that is, such mistakes as ordinary care and diligence cannot guard against. The law does not allow these defendants (if they would) to protect themselves from the consequences of negligence in transmitting messages. The case finds that the defendants are a corporation under the statutes of this State. (R. C. 1855, p. 1519.) Though there is some difference in the authorities as to whether these companies are subject to all the liabilities of common carriers, we think the weight of authority is, that they are, and that the reason of the thing is to the same effect. But there is no intimation in any of them, that they are not responsible when guilty of negligence, and many of them refer to that point as too plain to be talked about.

The instruction asked by defendant, and refused, as to the right to limit their liability, was properly refused, because it was an immaterial issue, and was not before the jury in that shape, as the whole question was put upon the ground of negligence, and all the advantage the defendant could have from the knowledge the plaintiff had of their "terms," was given to them by the last instruction given to the jury at defendants' request.

Common carriers cannot limit their liabilities by notice,

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but may by special contract. (11 N. Y. 484, Dorr v. N. J. & N. Y. S. N. Co.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted to recover damages for alleged carelessness of the Western Union Telegraph Company in transmitting a dispatch for plaintiff from St. Louis to New York city. The dispatch, as sent by plaintiff to his correspondent in New York, ordered them to ship to him at St. Louis, certain quantities of salt by "sail," and when it reached New York and was delivered it read, ship by "rail;" that is, the word "rail" was substituted for the word "sail" in the original dispatch. Accordingly a large proportion of the salt was forwarded by railroad instead of by canal and lake, as was originally intended by the dispatch. The shipping by railroad was much more expensive than by water, and the action was brought to recover the difference between the two modes of transportation. A judgment was rendered in the court below, for the plaintiff, for the sum of one thousand and eighty-five dollars and forty-four cents, and to reverse this judgment the case is brought here by appeal.

The defendant resists the recovery on the ground that all dispatches were sent over its lines on the following conditions, which, it appears, plaintiff had knowledge of:

"Terms and conditions on which messages are received by the company for transmission."—The public are notified that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged for repeating the message; and, while this company will, as heretofore, use every precaution to insure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages beyond an amount exceeding five hundred times the amount paid for sending the message, nor will it be responsible for mistakes or delays in the trans-

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mission of unrepeated messages, from whatever cause they may arise, nor from delay arising from interruptions in the workings of its telegraphs, nor for any mistakes or omissions of any other company, over whose lines the message is to be sent to reach the place of its destination. All messages will hereafter be received by this company for transmission subject to the above conditions."

The message was not ordered to be repeated.

Our statute, under which the company is incorporated, declares that it shall be the duty of the company, "on payment or tender of the usual charge, according to the *regulations* of the company, to transmit all dispatches, with impartiality and good faith, in the order of time in which they are received," &c. And such companies are made liable "for special damages occasioned by the failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering dispatches." (R.C. 1855, p. 1521, §§ 5-6.) The court has never before been called on to construe this statute, and the transmitting and communicating intelligence by means of the electric telegraph being of comparatively recent invention, but few adjudications have been made in respect to the liabilities of telegraph companies. In California the court seems to have applied the doctrine governing the liability of common carriers to telegraph companies. But in the California case, as well as the Maryland case to which reference has been made, there was not merely negligence, but an entire omission on the part of the operators of the companies to perform their duties. In the former, the dispatch was not sent until the day after it was received, in consequence of which delay the plaintiff lost a debt; in the latter, the dispatch was forgotten, and was not sent at all. But the Maryland court repudiates the doctrine, that a telegraph company is a common carrier, and assumes that it is a bailee, and that a party sending messages by telegraph, knowing that the engagements of the company are controlled by certain rules and regulations, engrafts them in contract of bailment, and is bound by them; and that rules ex-

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empting the company from liability for the non-transmission and non-delivery of unrepeated messages do not apply to a case where no effort is made by the company or its agents to put a message on its transit.

In the Kentucky case, the telegraph company had published notice in the precise language used by the defendant here and copied in this opinion. The plaintiff sent a message over its lines without ordering it to be repeated, or paying for having the same done. A mistake occurred in its transmission, whereby he lost one hundred dollars. The court held that the condition was reasonable and the defendant was not liable. The case of McAndrew v. The Electric Telegraph Company (7 Com. Bench, 3) is in point, and is ably reasoned. The statute 16 and 17 Victoria embodies a provision similar to ours in regard to telegraph companies, and the company there had given notice of which the one here is almost an identical transcript. The plaintiff delivered an unrepeated message to be transmitted over the company's line, directing a certain ship to proceed to Hull. By mistake, when it was received, it directed the ship to proceed to Southampton. On account of this mistake the plaintiff was injured in disposing of his cargo, and brought his action to recover damages; but the court said the condition was reasonable, and there was no objection to the company availing itself of the same protection that other persons in a similar position are entitled to do by law, by limiting its liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with it.

Whether we regard telegraph companies as common carriers or as bailees, we see no reason why they may not specially limit their liabilities, subject to the qualification, however, that they will not be protected from the consequences of gross negligence. Deny them this right and they will be utterly unable to protect themselves against the hazards and risks which are incident to the business in which they are engaged. We see nothing unreasonable in their declaring they will not be responsible for unrepeated messages. We

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think this description of liability comes within the intention of the regulations provided for in the statute. The system of telegraphing, however perfect it may be, is seriously affected by atmospheric causes, which are uncontrollable; and if a man wants to send a message of an important character, prudence and wisdom would seem to dictate that he should have it repeated, in order to be assured of its correct transmission. And as the repetition imposes additional labor, it is surely justice that an enhanced price should be paid. If the company undertake to insure the accuracy of the message, and assumes additional risk, it should be paid accordingly.

The message sent by the plaintiff was one of importance; he could have demonstrated its perfect correctness by having it repeated at a trifling sum, and he was fully cognizant of the regulations of the company.

The first, third, and fourth instructions prayed for by defendant should have been given, and the last paragraph of the instructions given for the plaintiff should have been refused.

The judgment is reversed, and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.



HENRY J. STIERLIN, Plaintiff in Error, *v.* HOSANNAH DALEY
et als., Defendants in Error.

1. *Revenue—Lands—Conveyances.*—Under the Revenue Act of November 23, 1857, § 33, the deeds executed by the Register are *prima facie* evidence of title in the purchaser only when duly executed and recorded. A deed is not duly executed unless it be proved or acknowledged in the manner provided by the "Act relating to conveyances"—R. C. 1855, p. 384. Without being proved or acknowledged, the deeds cannot be recorded.
2. *Revenue—City of St. Louis—Conveyances.*—A tax deed, made upon a sale of lands by the City of St. Louis for unpaid taxes, must show a strict compliance with the statute. (Acts 1857, p. 99, § 43.) All such statutes, authorizing proceedings which are to have the effect of divesting a citizen of his title to real estate, must be strictly construed and strictly pursued.

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Error to St. Louis Land Court.

This suit was instituted by petition in ejectment, filed September, 1863, to recover possession of a lot of ground on Stoddard avenue, in the city of St. Louis.

The original answer put in issue the allegations of the petition. Subsequently, on motion of the attorney for defendants, the court permitted another answer to be filed, in the name of Charles Ganong and others, charging that these latter parties were the heirs of the original owner of the property, and that defendants were tenants holding under them. There was no authority produced then, or at any other time, from Charles Ganong and others, for such a proceeding; nor was there any evidence, on the trial, showing any connection between said Ganong and others and said defendants, as tenants or otherwise. On the contrary, it appeared, on trial, that defendants were in possession of the premises without any color of title whatever, and had never paid rent or taxes on the property. It further appeared that the original owner, Joseph W. Ganong, went to California in 1851, and never returned; that an agent acted for him here a year or two after he left, and paid taxes; that defendant Hosannah obtained possession about 1852 or 1853, and remained in possession thereafter, without paying rent or taxes.

The plaintiff claimed title through deeds from parties who claimed under tax deeds from the State of Missouri, and under tax deeds from the City of St. Louis.

For the purpose of showing chain of title, the plaintiff (among other title papers) produced in evidence the following, to-wit: 1. A State tax deed, dated 12th March, 1863, (for taxes of 1857,) executed by the Register of the State of Missouri to Amelia Welcker, duly executed and recorded both in the office of the Register of Lands and in that of the recorder of St. Louis county; 2. A State tax deed, dated 12th March, 1863 (for taxes of 1858), to A. Welcker and A. Stierlin, executed and recorded in like manner as the above; 3. A city tax deed, dated 7th May, 1863 (for city taxes of

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1858), executed by the comptroller of the City of St. Louis to Amelia Weleker.

The ordinances of the City of St. Louis (revisions of 1856 and 1861) were put in evidence.

J. K. Knight, for plaintiff in error.

I. The court below erred in refusing plaintiff's first instruction. It is in the very words of the statute, and there is no room for construction—§ 3 $\frac{1}{4}$, Art. V., Acts 1857, p. 98.

The statute is imperative, and there being no defects apparent on the face of the instruments, they must be held to have the effect declared by the statute. To hold otherwise, is to impeach the power of the Legislature. The power of the Legislature to declare tax deeds *prima facie* evidence of title in the purchaser cannot be questioned—Blackw. Tax T. 79, et seq.; Gwyn v. Neiswanger, 18 Ohio, 400; Thomas v. Lawson, 21 How. (U. S.) 332; Pillow v. Roberts, 13 How. 472; Hogins v. Brashears, 13 Ark. 242.

The objection that these deeds were not acknowledged before being filed for record, is groundless; the 42d section of the act (1857) does not require it. This section simply requires them to be recorded; and cannot an instrument be recorded without being acknowledged? The sole object of acknowledgment is authentication. These deeds are executed by an officer of the State, and under the seal of the State. The seal of the State implies absolute verity. In such case, it is simply absurd “to prove” or “certify the execution,” or to “acknowledge the execution.” Instruments under the seal of the State are as much entitled to record as a United States patent, or a decree under seal of court—Graves v. Bruen, 1 Gilm., Ills. 167; Thompson v. Schuyler, 2 Gilm., Ills. 271; 6 Watts, 269.

But if this were a valid objection, it cannot be urged by defendants; they are without muniment of title of any sort, and cannot attack a deed on the mere ground of informality. Trespassers without color of title cannot object that the re-

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quisites of the statute have not been complied with—Macklot v. Dubreuil, 9 Mo. 477; Bellows v. Elliott, 12 Vt. 569.

II. The court erred in refusing plaintiff's second instruction. The city tax deed, executed by the comptroller (marked 3), was properly acknowledged and recorded. The 43d section of the act (1857) gives the same effect to city tax deeds as to State tax deeds.

The intention of the Legislature being expressed in unambiguous language, there is no room for construction, and the legislative will must be carried out by the courts—2 Cranch, 358. The statutes prior and subsequent to the act of 1857, on this subject, show the intention of the Legislature—Acts 1860-1, p. 85, §§ 34, 35; Acts 1863-4, p. 89, § 22. These statutes are *in pari materia*, and are conclusive as to the intention of the Legislature—4 McLean, 463; 2 Md. 111; 10 Pick. 248; 3 Scam., Ills. 144; 3 How., U. S. 516; 2 Gibbs, Mich. 486.

Krum & Decker, for defendants in error.

I. The court below having refused to declare the law as desired by the plaintiff, he immediately submitted to a voluntary non-suit.

The defendant asked no instruction. The court did not decide that the plaintiff was not entitled to recover; in fact, the court decided nothing affecting the plaintiff's case. The plaintiff went out of court before it had an opportunity to decide the case. The plaintiff cannot assign his own voluntary withdrawal of his suit for error. If this view is not taken by this court, we maintain the further propositions below.

II. It is a misnomer to call either of the writings, purporting to have been signed by the Register of Lands, deeds of conveyance; they are not deeds. The first recites a sale made in 1858, for a tax assessed in 1857. This writing, or so called deed, is in the name of John F. Houston, Register, &c., as the granting party, though it is signed by Sample Orr, Register of Lands.

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The lot sued for is lot 7, in block 6, in Morton's addition, now city block 470. The description in this deed is a lot of 30 feet, &c., in block 470. The second deed describes the lot substantially as it is described in the petition, viz: lot 7, in block 6, Morton's addition.

Neither of these so called deeds are sealed instruments. The Register affixes his seal of office, nothing more. It is assumed by the appellant that these deeds are executed under the seal of State. This is a mere assumption, for the Register is not the keeper of the seal of State.

III. These so called register's deeds are not operative to pass title, because they were neither acknowledged nor proved.

The general law of this State requires that every instrument in writing, whereby any real estate is conveyed, or may be affected, &c., shall be acknowledged or proved—Act concerning Conveyances. The Register of Lands, like a private individual, in order to make a conveyance of land, must conform to the requirements of the general law of the State.

The Revenue Act, under which the tax sale and tax deeds were made, is silent as to the mode of executing the deed, consequently the general law governs. These deeds are inoperative to convey title to the land in question.

The Revenue Act, relative to the making and recording of tax deeds, &c., does not change the rule established by the general law in respect to the execution, acknowledging, or proving and recording deeds. The Act concerning Conveyances and the Revenue Act can and should be construed together—R. C. 1855, p. 364, § 4; § 10, Recorders, R. C. 1855, p. 1313.

The 33d section of the Revenue Act, approved November 23, 1857 (under which it is assumed the tax sales in question were made), authorizes the Register of Lands to "execute good and sufficient deeds of conveyance to all persons entitled thereto," &c., which he shall record, &c.

In this State, a conveyance in fee or of a freehold can only be made by deed; that is, by a writing under seal—§ 15,

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Act regulating Conveyances. A deed of conveyance, *ex vi termini*, means a written instrument sealed and delivered.

The general law requiring conveyances to be "subscribed and sealed," is as applicable to conveyances made by a public officer as to those executed by private individuals—Black. Tax T. ch. 22, p. 364, and cases cited.

IV. The comptroller's deeds are subject to the same objections, viz., that they are not sealed instruments. While the deed dated May 7, 1863, purports to have been executed by the comptroller, "under my seal of office," no seal of any kind is affixed. Neither his official or private seal is affixed.

The City of St. Louis became the purchaser at the tax sale. The title, if any was acquired, was in the city. This deed is not in the name of the city, nor does it purport to be the grantor. The deed is between George K. Budd, comptroller, and Amelia Welcker. It is supposed that this deed was made, or intended to be, in pursuance of § 21, Rev. Ord. 1861, p. 380. This section of the ordinance is simply an authority or power to the comptroller to make deeds, &c.; but as the title was in the city, the deed must be made by the city, i. e. the city must be grantor, and not the comptroller. This instrument, dated May 7, 1863, is not a deed, in the sense of the law, nor does it purport to be made by the City of St. Louis as the granting party—Nelson v. Gœbel, 17 Mo. 161.

V. It will be observed that the comptroller's deed, dated May 30, 1863, is signed by him, but he neither affixes his official or private seal; nor is this deed made to the purchaser at the tax sale, but to the plaintiff. This deed is therefore without authority. The comptroller, under the power delegated to him by the ordinances of the city, was only authorized to make deeds to the purchasers at tax sales.

No authority was shown to make this deed. In other respects, this deed is subject to the objections which we make to the other comptroller's deed. It is true, this deed is countersigned by the register, and he affixes his seal to his attestation; but this adds nothing to the validity of the deed. The register is not a party to the deed. The signing and sealing

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contemplated by the law must be done by the party grantor, or duly authorized agent.

VI. It is insisted by the appellant, that the comptroller's deeds (both having been acknowledged and recorded in St. Louis county) are on a footing with deeds made by the Register of Lands, and are *prima facie* evidence of title in fee simple in the purchaser, &c. To this we reply, that in no case is a tax deed, whether made by the Register of Lands or the city comptroller, *prima facie* evidence, &c., except when made to the purchaser at the tax sale. This is the only construction that can be put upon the act.

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment upon a tax title. The plaintiff produced in evidence two tax deeds, executed by the State Register of Lands, the one to Amelia Welcker, and the other to A. Welcker and A. Stierlin, as purchasers at the sales for taxes; and the deeds, dated March 12, 1863, were executed by the Register of Lands under his seal of office, and were recorded without having been acknowledged. He also offered in evidence a tax deed of the date of May 7, 1863, executed by the comptroller of the City of St. Louis to Amelia Welcker, purchaser at the sale, under the seal of the corporation, signed by him, and attested by the city register, duly acknowledged by the comptroller, and recorded. Some other evidence was introduced, and the plaintiff asked the court to instruct the jury as follows:

1. That the tax deeds executed by the Register of Lands of the State of Missouri, if genuine, are *prima facie* evidence of title in fee simple in the purchasers therein named.

2. That the tax deed executed by George K. Budd, comptroller of the City of St. Louis, if genuine, is *prima facie* evidence of title in fee simple in the purchaser therein mentioned.

These instructions being refused, the plaintiff took a nonsuit, with leave to move to set the same aside.

The Revenue Act of 1857 (§ 33) requires the Register of

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Lands to "execute good and sufficient deeds of conveyance to all persons entitled thereto"; and provides (§ 34) that such deeds, executed and recorded as required by the act, shall, without further proof, be received as evidence in all courts in which the title is brought in question, and that they shall be *prima facie* evidence of title in fee simple in the purchaser, and the burden of proving that the title is not in the person claiming to hold under the deed from the Register of Lands shall be upon those claiming adversely to such deed—Laws of 1857, p. 99. And the same act provides that such tax deed shall be taken and held to be within the terms and meaning of the fortieth, forty-first and forty-second sections of the Act concerning Conveyances, and that, until recorded under those sections in the office of the recorder of the county where the land lies, the deed shall not have any effect against the rights of any one not having actual notice thereof—§ 42, p. 100. The fortieth section referred to provides that deeds, proved or acknowledged, and certified in the manner prescribed in that act, may be recorded. The other sections provide that deeds when recorded shall impart notice, and that until recorded they shall not be valid, except as between the parties thereto and such as have actual notice thereof—R. C. 1855, p. 364. These deeds were neither proved nor acknowledged; nor was there any proof of their execution, or of actual notice. They are to be governed by the express provisions of the statute, and the statute must be strictly complied with. Without being proved or acknowledged, they could not be recorded under those sections; and without being recorded as therein required, they are to have no effect against other parties, without actual notice. This alone was a sufficient reason for refusing the first instruction.

The other instruction proceeds upon the forty-third section of the same act of 1857, which declares that "all tax deeds for lots or lands sold under ordinances of the City of St. Louis for the non-payment of taxes due said city, shall be received in like manner, and shall have the same force and effect, when recorded, as State tax deeds in this article provided

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for." This section introduces a new subject, and is exceedingly vague and indefinite. For one thing, it would seem necessarily to be inferred that it must first be shown that the lots or lands in question had been sold under ordinances of the City of St. Louis for the non-payment of taxes due the city. For another thing, it might be conjectured that the framer of the act had intended to make such deeds admissible in evidence in the courts, but the words of the act have not said so. It is said that they shall be received, and have the same force and effect, when recorded, as State tax deeds have when recorded, as provided for in that article. The effect of recording is simply to impart notice. It is very probable that the legislator had some general intent, in his mind, to place the deeds on the same footing as to being admissible in evidence in court, and as to being *prima facie* evidence of title when recorded as the act requires; but the language used does not directly and plainly import all this. It is capable of another construction. The provision, so interpreted, would be in derogation of the common law rules of property in real estate, as the provisions about State tax deeds are also; and the principle seems to have been very generally acted upon in this class of cases, that the common law rules must be adhered to, except so far as they have been changed by the very words of the statute, and that all such statutes, authorizing proceedings which are to have the effect of divesting the citizen of his title to real estate, though for the good of the public, as well as the powers given by such acts, must be strictly construed, and strictly pursued—Sibley v. Smith, 2 Mich. 490; Blackw. Tax T. 86; Tanner v. Stine, 18 Mo. 580. If we were to adopt the most liberal rules of construction, and proceed to gather the intent from the whole purview of the act, with the largest intendment in favor of the tax title, as might be proper in the construction of statutes in general, it is very possible that we might hold that this section was intended to make city tax deeds receivable in evidence in all courts, and to give them the effect of being *prima facie* evidence of title in fee simple in the pur-

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chaser. But we do not conceive that we are at liberty to do so, in a case of this kind. The rule of strict construction forbids it; and we think the rule is founded in justice and good policy.

On the case made, we think both instructions were rightly refused.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace not sitting.

Motion for re-hearing overruled.

OCTAVIA BOYCE AND HENRY BOYCE, Plaintiffs in Error, v.
HENRY BAKEWELL, JOSEPH M. BRANCH, AND SUSANNAH
SUMMERS, EXECUTORS OF STEPHEN F. SUMMERS, Defendants
in Error.

Landlord and Tenant—Lease—Assignment.—If a lessee makes a general assignment “of all his property whatsoever,” or of “all his property of every sort and description,” for the benefit of his creditors, the trustee becomes bound as assignee of the lease if he accept the assignment and enter under the lease. The question to be determined in such case is, whether the assignee accepted the premises as tenant of the lessor and as assignee of the interest of the lessee.

Error to St. Louis Circuit Court.

Wickham and Hamilton, for plaintiffs in error.

There can be but little doubt that the assignment operated to transfer the lease to Summers, and still less doubt that Summers as assignee accepted the lease and actually occupied the premises under it.

I. The assignment is general for the benefit of all of the assignor’s creditors, and purports to be made with the intention of “applying all of his property of every kind and description to that purpose.” The terms of transfer are, “all of the property of the party of the first part, of every nature, kind and description, consisting of goods, wares and merchandise, hardware, books, notes, accounts, fixtures and

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store furniture, contained in the store-house now occupied by the party of the first part, known as No. 137 North Third street, in the city of St. Louis." In other words, the assignor denotes his intention to transfer everything, and the assignment is accordingly, of all of his property. The super-added words are but an attempt to particularize the constituents of the property. Such a specification is only a defective enumeration, and does not limit or cut down the transfer to the specified articles. This was the construction put upon the instrument by the parties themselves—*Platt v. Lott*, 17 N. Y. 478; *Turner v. Jaycox*, 40 Barb. 164; *Burchell v. Strauss*, 28 Barb. 293; *Nye v. Van Husan*, 6 Mich. 341-2; *Ely v. Hair*, 16 B. Mon. 239; *Goddard v. Wagner*, 2 Stro. Eq. 10; *Jarnagan v. Conway*, 2 Humph. 51.

II. Summers, through his agent Henry W. Miller, occupied and used the premises from the time of the assignment, December 1, 1860, until his own transfer to Beardslee in the spring of 1862. The assignment by Summers to Beardslee was sufficient to pass the leasehold interest. There was such an acceptance of the lease and dealing with the property as made Summers liable for the stipulated rent for the time he was in possession—*Dorrance v. Jones*, 27 Ala. 630; *Burr. on Assign.* 475-6, 540; *Morton v. Pinckney*, 8 Bosworth, 135; *Carter v. Warne*, 4 Car. & P. 191; *How v. Bennett*, 3 A. & E. 659.

III. The instruction for the plaintiffs, and the third given for the defendants, are in conflict. The first of these (based on *Carter v. Warne*, 4 Car. & P. 191) acknowledges the right of action, if, as was fully proven, Summers deprived the plaintiffs of the beneficial enjoyment of the property, or dealt with it as if the lease were vested in him; while the other in effect denies all right of recovery under any possible aspect of the case; for there was no pretence that the lease to Miller had been surrendered.

Knox & Smith, for defendants in error.

The court will perceive that the deed of assignment, shown
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in evidence, was not a general assignment for the equal benefit of all creditors, but an assignment of special property for the benefit of those named. The deed of assignment did not convey the lease in question. Summers never had any interest in the lease, and the principle that the assignee is liable, for the time he holds as assignee, does not apply in this case. Summers was only a sub-tenant of Miller, and his liabilities are no greater and not different from what they would have been had he been the assignee of some third person, and received the goods into this store as Miller's tenant.

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs exhibited their demand in the Probate Court of St. Louis county, against the executors of Stephen F. Summers, claiming the sum of \$1,133.33 for rent of a three-story brick building on Third street, for the period of seventeen months, at the rate of eight hundred dollars per annum. The Probate Court allowed the sum of five hundred dollars, and the defendants appealed to the Circuit Court, where a trial was had and judgment given for the defendants.

To reverse this judgment, the plaintiffs bring the cause here by writ of error. On the trial, the plaintiffs gave in evidence a lease from them to one William W. Miller, of the premises described, for the period of five years, dated June 1, 1857, at the annual rent of \$800, payable in monthly instalments. Second, an assignment dated December 1, 1860, by the lessee Miller to Stephen F. Summers, for the benefit of the assignor's creditors, wherein he "sells, aliens, transfers, assigns, conveys and delivers" to the said Summers all of his property "of every nature, kind and description, consisting of goods, wares and merchandise, hardware, books, notes, accounts, fixtures and store furniture, contained in the house" occupied by the assignor. Third, a deed of assignment executed by Summers to Reuben Beardslee, dated February 5th, 1862, though not acknowledged till the first day of May thereafter, by which Summers conveyed to Beardslee

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the above property, for the trusts and purposes described in the deed from Miller to him. Evidence was then given tending to prove that Summers took possession of the store-room by his agent, and the goods therein contained ; that the goods were of the value of \$4,000, and that the stock was increased from time to time and kept at about that amount during the time they were under the control and in the possession of Summers, viz., from the first of December, 1860, to the first of May, 1862 ; that Miller occupied the upper stories of the house by himself and tenants, and that Summers had only the first story, or store-room. Demand was made several times on Summers for rent, who always replied he would see Miller and have it paid.

In behalf of plaintiffs, the court, in substance, declared the law to be, that if Summers had by himself or agent so acted as to render the premises in question less valuable, or as if the lease was vested in him, then there was an implied undertaking to pay plaintiffs what the premises were reasonably worth during the continuance of such acts.

Three propositions of law were then declared for defendants : First, that the action cannot be maintained unless the plaintiffs proved the existence of a tenancy between them and defendants. Second, that although defendant may have been in the possession of the premises, yet unless he was there as tenant of plaintiffs, the plaintiffs cannot recover. Third, if the plaintiffs leased the premises in question to Miller, and the lease was still in existence at the time the defendant was in possession of the premises, the plaintiffs cannot recover.

The trial was before the court, a jury being dispensed with by both parties. It is necessary in arriving at an intelligent conclusion, to ascertain whether the lease passed by the assignee to the assignee. The assignor declares that he is indebted to certain persons, and that "he is unable to provide, promptly and at maturity, money for all of his obligations and indebtedness, but is desirous of applying thereto all of his property of every kind and description." He then

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assigns and conveys to the assignee all his property "of every nature, kind and description, consisting of goods, wares, merchandise, etc., contained in the store-house occupied" by him. He then proceeds to authorize the assignee to collect all notes, accounts, choses in action, which are due and owing to him, or which may become due, and with the proceeds arising from the sale of the assigned property, and from collections, he is to pay, first, the expenses of executing the trust, and the balance to certain designated creditors.

It must first be determined whether the enumeration of the articles and choses in action, purporting to be assigned and conveyed, has the effect of restraining the general clause which speaks of all the property of every nature, kind and description. Where in the granting clause in an assignment the language was, "all the goods, property, wares, merchandise, etc., belonging to, and now due and owing to the said assignor, or to which and in which he has any right, property, claim or demand, which said goods, wares and merchandise hereby granted and sold, are particularly described and enumerated in the schedule A.," etc., it was held that the clause in respect to the schedule was so intimately connected with the granting clause, that the words "hereby granted and sold" operated as words of limitation, and expressly confined the transfer to such goods as were mentioned in the schedule—*Wilkes v. Ferris*, 5 Johns. 335. In *Platt v. Lott*, 17 N. Y. 478, an action was brought to recover possession of certain personal property taken by the defendant as sheriff, upon an execution against certain assignors. The plaintiff claimed the property by virtue of an assignment made to him by the assignors, the execution debtors, in trust for the payment of debts, and the question was, whether the title to the property levied upon by the sheriff was vested in the assignee. The deed of assignment commenced by reciting that the parties of the first part were "indebted to divers persons in divers sums of money," and that they were "desirous of providing fully for the payment thereof by an assignment of

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all their property and effects for that purpose." It then proceeded to assign and transfer to the plaintiff the property of the assignors, described in the following terms:—"All and singular the lands, tenements, hereditaments and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action, claims, demands, property and effects of every description belonging to the parties of the first part, or in which they have any right and interest whatsoever; the same being more fully and particularly enumerated and described in a schedule thereof hereunto annexed, marked 'Schedule A.'" By a subsequent clause, the assignee was authorized "to ask, demand, recover and receive, of and from all and every person and persons, all the property, debts and demands belonging and owing to said parties of the first part." The schedule annexed to the assignment embraced property to the amount of several thousand dollars, but did not include the property in controversy. The assignment was made in trust to sell and dispose of the property, to collect the debts and apply the proceeds, and it was admitted on trial that the property in question never passed to the assignee, but was actually delivered by the assignors to the plaintiff the day after the assignment was executed, and was in his possession when it was levied on by the defendants.

It was contended on the part of the defendants, that the general words of the assignment were limited and controlled by the specifications contained in the schedule, and that nothing passed to the assignee except the property enumerated. But the court held that the language in the granting clause was sufficiently broad and comprehensive to transfer all of the assignor's property, and that it passed and vested in the assignee, whether enumerated in the schedule or not. And so it is now well settled, that if the lessee make a general assignment of "all his property whatsoever," or of "all his property of every sort and description," for the benefit of his creditors, the trustee becomes bound as assignee of the lease, if he accepts the assignment and enters under the

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lease—Dorrance v. Jones, 27 Ala. 630; Herwitz v. Davis, 16 Md. 313.

But there must be an acceptance by the assignee, and an entrance on the leased premises, under and by virtue of the assignment. A lease is deemed property, or not, in such an assignment, at the election of the assignee; and until he accepts it or elects to enter under it, it will not be binding on him. Instead of being property, it may be a heavy encumbrance; a debt instead of a benefit—Carter v. Hammett, 12 Barb. 253. But if he goes on the premises, and actually occupies them under the assignment, he will be liable for use and occupation as tenant, for the time he is so in possession. The question to be determined in all such cases is, whether the assignee occupied the premises as tenant of the lessor and as assignee of the interest of the lessee.

If the jury respond affirmatively to this inquiry, the plaintiff is entitled to recover. The deed of assignment was sufficiently comprehensive to transfer and convey the lease to the assignee, and if he accepted it and went into possession under it, his liability became absolute.

The third declaration of law given by the court for defendants, was, that plaintiffs could not recover if the lease from plaintiffs to Miller was in existence during the time defendant was in possession of the premises. This was clearly wrong.

The judgment will be reversed, and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

JOHN L. BERNICKER, Respondent, *v.* WENDELIN MILLER, Appellant.

Justices' Courts—Appeals.—When an appeal is taken from the judgment of a justice of the peace during the term of the Circuit Court, the transcript and papers must be filed in the Circuit Court within six days after the rendition of the judgment—R. C. 1855, p. 797, § 12.

Appeal from St. Louis Land Court.

Morehead, for appellant.

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Gardner, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action for unlawful detainer, commenced before a justice of the peace in St. Louis county. The trial before the justice was had on the 11th day of April, 1864, and the plaintiff obtained judgment. The defendant applied for an appeal, and filed his affidavit and bond, on the same day. The St. Louis Land Court, which was the appellate court in this instance, was in session at the time. No transcript was filed by the appellant within the time prescribed by law, and on the 2d day of May the appellee produced a transcript and papers in court, and moved to dismiss the appeal, because the appellant had failed and neglected to file the transcript within the time provided by law, and because he had failed and neglected to prosecute his appeal with effect and without delay. The court sustained the motion, and dismissed the appeal.

When the judgment of the justice is rendered during the vacation of the Circuit Court (Land Court in this case), the appeal is returnable to the first day of the next term; but when the judgment is rendered during the term of such court, the appeal is returnable within six days after the rendition of the judgment—R. C. 1855, p. 797, § 12. It is the duty of the appellant to cause to be filed in the office of the clerk of the court to which the appeal is taken, a certified transcript of the record and proceedings before the justice, together with the original affidavit, recognizance and other original papers in the cause, on or before the return day of the appeal; and if he fail to file such transcript and other papers on or before the return day of the appeal, the appellee may produce them, and the court shall affirm the judgment, unless the appellant show good cause for the default—R. C. 1855, p. 799, §§ 23, 24. No cause was shown, or attempted to be shown, by the appellant, for the delay in producing the transcript and papers. It was his duty, not the justice's, before whom the cause was tried, to produce and

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file the papers—Keim v. Daugherty, 8 Mo. 498. The appellee had the right to demand, and it would have been proper in the court to have affirmed the judgment; though, as the law was not complied with, it had also the right to dismiss.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

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THE STATE OF MISSOURI TO USE OF SAMUEL N. HOLLIDAY *et al.*, Respondent, *v.* LOUIS A. BENOIST *et als.*, Appellants.

1. *Assignments—Mortgage—Deed of Trust.*—A conveyance of property to trustee to sell, to pay the debts of the grantor, without condition, is an assignment for the benefit of the creditors named and preferred.
2. *Frauds—Assignments.*—In general, a party may assign his property as he pleases; but where there are numerous creditors, he cannot use an assignment as a means of preserving his property from the lawful actions and demands of his creditors. An assignment made with intent to delay, hinder or defraud creditors, is fraudulent. Where such intent appears upon the face of the instrument, it will be declared void, as a matter of law. The essence of the fraud consists in the fact, that the deed is not made in good faith for the payment of honest debts, but for the advantage of the grantor, and for the purpose of postponing and defeating the just claims of creditors.
3. *Assignments—Preferences.*—An assignor may make preferences, by making a partial assignment for the benefit of particular creditors, but in so doing the assignment must be made for the genuine purpose of paying honest debts, and not for the use and benefit of the grantor, nor to hinder, delay and defraud other creditors.

Error to St. Louis Court of Common Pleas.

This was an action instituted by the plaintiffs on a bond given by Benoist to the sheriff of St. Louis county, upon the levy of an execution in favor of Benoist against the Pilot Knob Iron Company. Plaintiffs claimed the property as trustees and assignees. The execution creditor gave bond as required by the St. Louis act respecting sheriffs, &c. The action involves the validity of an assignment, or conveyance in trust, made by the Pilot Knob Iron Company in February, 1862. The powers given in the deed were as follows:

“In trust, however, for the following purposes, to-wit:—

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The said parties of the second part shall enter into and take immediate possession of all the property, real, personal and mixed, herein conveyed, and shall proceed to dispose of the same at public or private sale, as to them may seem most advantageous, and on such terms and for such prices as they may deem proper after consulting with the principal holders of the notes and bonds described in the beginning of this deed, or with the said John S. McCune and James H. Lucas, and shall use their best endeavors to collect in, recover, receive and convert into money the notes, debts and judgments herein described as owing to the said party of the first part; and may institute, prosecute and defend all such suits, process at law or in equity, and execute, perform and transact all such deeds, writings, acquittances, acts, matters and things as shall be necessary or expedient to carry into effect the trusts, uses, interests and purposes herein declared and contained; and may, at discretion, compound any of the debts due or owing to said party of the first part, and herein transferred to said parties of the second part, and enter into and execute any bargain of composition, compromise or arrangement with any of said persons indebted to the said party of the first part, as before said, who shall be or become insolvent or unable to make punctual payment; and also may make any such agreement or arrangement as shall be deemed reasonable with any person possessing any of the said securities given by the said party of the first part to parties of the second part; but it is understood, agreed and provided, that the naming of any debt or debts in this deed required to be paid, shall not prevent the parties of the first or second part from calling in question or controversy the amount of same, or taking any course at law or in equity to have the same disallowed or adjusted; and if the said trustees shall determine to sell all or any of said property at public sale, they are hereby authorized to sell the same at any time at public vendue to the highest bidder, for cash, or part cash and part on time, as to said trustees may seem best, first giving twenty days' public notice of the time, terms and place

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of said sale, and of the property to be sold, by advertisement in the St. Louis County Legal Record and Advertiser, or some other paper printed in the city of St. Louis, Missouri (the place of sale to be left to the discretion of the trustees); and upon such private or public sale shall execute and deliver deeds in fee simple of the property sold, if real property, and bills of sale, if personal property, to the purchaser or purchasers thereof, and receive the proceeds of such sale or sales, out of which they shall pay, first, the costs and expenses of executing this trust, including compensation to the trustees, and shall pay *pro rata* the bonds and coupons endorsed by John S. McCune and James H. Lucas, as described in the beginning of this deed, and the notes, as described in the beginning of this deed as made or endorsed by John S. McCune and James H. Lucas, and all other notes described in this deed; and also the amount due Mrs. Jane F. Clapp, as also stated in the beginning of this deed; and they may repeat said process of public sale as often as may be necessary. And the said trustees are hereby authorized to hire a good and competent clerk or clerks, and as many men as may be necessary, to gather together, watch and protect and dispose of said property, at reasonable wages. And the said parties of the second part covenant faithfully to perform and fulfil the trust herein created.

“In witness whereof,” &c.

The petition sets forth the deed as plaintiff's title, and the answer puts its validity in issue, and states that said deed is fraudulent and void, and a contrivance to hinder, delay and defraud the creditors of the company. The answer further averred, that since the execution of said deed all of the debts due by said company, in said deed expressed, have been fully paid and satisfied.

The plaintiff, on the trial, read in evidence the deed of trust or assignment. The defendants insisted that the deed was void on its face; this objection was overruled, and defendants duly excepted.

The parol evidence tended to prove that the company was

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largely in debt at the time of the conveyance; that defendants, Benoist & Co., were creditors; that the debts of the company were fast maturing; that the assignee or trustee, Yore, was clerk of Lucas, and Holliday a relative of McCune; that McCune and Lucas were heavy stockholders and directors; that after the assignment the office of the company continued at its former place, McCune's office; that McCune continued to direct sales of property; Holliday and Yore never assumed control, but directed the clerk to receive instructions from McCune, which he did; and so McCune carried on the business, he being president of the company; property was sold at McCune's direction, debts paid by his direction, money drawn on his checks, no checks drawn by Holliday or Yore; and in September, 1863, Holliday and Yore made a deed back to the company, in a re-organized condition. The debts secured were nearly all paid, except ninety thousand dollars not due.

The evidence tended further to prove that Benoist was a creditor of the company; suit brought and judgment obtained, and execution issued.

Defendants also read in evidence the proceedings of board of directors of the Pilot Knob Iron Company, May 13, 1861—present Lucas and McCune—tending to show that the deeds were made for the security and benefit of McCune and Lucas, and also for the purpose of keeping the property temporarily out of the market.

It did not appear that any of the holders of the bonds were ever consulted, or ever knew anything about the assignment, or ever claimed under it. Further, that Holliday and Yore never assumed actual possession, but permitted the president of the company (McCune) to continue its business until they (Holliday and Yore) again released the property.

All the instructions asked by the defendants were refused. The only question submitted to the jury was, whether the debts mentioned in the deed were genuine. All questions of fraud were taken away from the consideration of the jury.

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Krum & Decker, for appellants.

- I. The deed of conveyance was, in law, void on its face.
- II. The court erred in refusing to allow the jury to inquire into the actual intent with which the deed was made, and whether the beneficiaries were parties to a fraudulent intent.
1. The court erred in admitting the deed of trust or assignment under which the plaintiff claims ; this conveyance is absolutely void on its face.

Every transfer of property must be in accordance with the established rules of law ; where a party attempts to evade the law, the law will foil his attempt. In this State, the statute of assignments (R. C. 1855) declares the policy of the State in regard to assignments, and provides positively the mode in which assigned effects shall be administered for the benefit of creditors.

Contracts of assignment made in violation of this statute will be held void—*Emerick v. Harlan*, 1 Beasly, N. J. 230; 4 Sandf., S. C. 252; 7 Gill. 446; 21 Conn. 604.

The case at bar presents an assignment, in which the attempt to coerce the creditors is more apparent than in 6 Mo. The assignment before the court is a bold attempt to evade the masculine provisions of the statute law.

The deed under consideration conflicts with all the material provisions of this statute, and is an attempt to make an assignment, and place the assignee beyond the control of the court, by vesting him with certain special trusts personal in their nature, and which cannot be transferred to another, or exercised by another.

They could not make any preferences among the creditors within the assignment, but they attempt to evade this by putting it within the power of the assignee to dispute the creditor's claim, to compromise, compound, and settle with him ; thus indirectly giving a preference among creditors, which directly they are prohibited from doing—Leading case, *Grover v. Wakeman*, 11 Wend. 187; *Murphy v. Bell*, 8 How. Pr. 468; *Woodburn v. Musher*, 9 Barb. 255; *Hudson v. Bell*, 3 Seam., Ills. 578.

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An assignment, to be valid, must be free from all provisions tending to hinder or delay creditors—*Burr. Assign.* 236.

The power given to the assignee to compound, and compromise, and settle with the creditors, is of itself fatal; but this deed goes further. It will be observed that it is declared, that “the naming of any debt in this deed, required to be paid, shall not prevent the assignor or assignee from calling in question or controversy the amount of the same, or taking any course at law or equity to have the same disallowed;” then there is the power to retain the property from sale for an indefinite period, at the discretion of the trustee; and then the power to compromise and settle with the creditors, given to the trustee. If a stronger case of intent to hinder, delay or defraud creditors has ever appeared, it is unknown to us. But in the case at bar, we have an assignment designed to create preferences among creditors, so that they could not be detected; containing a provision which can only be of benefit to the assignor, by extorting from the creditor a release, which, if it existed in terms, would avoid the whole assignment; it converts the debtor into a dispenser of alms to his own creditors, and puts up his favor and bounty, and the favor of the trustee, at auction, under cover of a trust, to be bestowed on the highest bidder.

It is the contract of the creditor, if he takes under it, as well as the contract of the debtor; and if he accepts it at all, he takes it subject to all its conditions and restrictions.—*Burrows v. Alter*, 7 Mo. 424; *Martin v. Maddox*, 24 Mo. 575. There is no difference in principle between assignments direct to preferred creditors, or to trustees for their use—*McClurge v. Lackey*, 3 Pa. 83; *Passmore v. Ellbridge*, 12 Serg. & R. 198.

2. By our statute (copied from 27 Eliz.), every conveyance made with intent to hinder, delay or defraud creditors, is void—*Martin v. Maddox*, 24 Mo. 575; *Wise v. Wimer*, 23 Mo. 238; *Brooks v. Wimer*, 20 Mo. 503; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *Lee v. Watson*, 8 Mo. 323; *Gates v. Labeaume*, 19 Mo. 17.

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If the plaintiffs recover at all, it will be directly for the benefit of the insolvent company; by their deed, the company will receive this amount—*Burr. Assign.* ch. 17, pp. 249, 259, & ch. 19, pp. 405, 413, et seq.

Casselberry, for appellants.

The above deed of trust was recorded in Iron county, February 19, 1862; and in St. Louis county, February 24, 1862.

The plaintiffs offered the above deed of trust in evidence, to the reading of which the defendants objected, on the ground, among other things, that the deed is void; but the court overruled the objection; to which overruling the defendants at the time excepted, and the deed was read in evidence notwithstanding the objections.

I. The deed of trust is void because it authorizes the trustees to sell on credit. An assignment by insolvent debtors of their property to trustees for the benefit of their creditors, authorizing the trustees to sell the assigned property upon credit, is fraudulent and void, as against the creditors of the assignors, on account of the delay—2 *Seld.* 510; 24 *Ills.* 257; 11 *Md.* 173; 2 *Duer.* 533; 21 *N. Y.* 168; 17 *N. Y.* 21; 6 *Seld.* 691; 12 *Wis.* 362; 7 *Paige.* 37; 9 *Paige.* 405; 2 *Comst.* 365; 12 *Barb.* 168.

II. The deed of trust is void because it authorizes the trustees to compromise, arrange and compound with the creditors. The giving of the assignees power to compound with all or any of the creditors, makes the assignment illegal—4 *Paige.* 41; 11 *Wend.* 187, 203, 208.

III. The deed of trust is void because it requires the trustees to consult John S. McCune, the president, before acting. The reservation by the assignor of any power over the property assigned makes the assignment void—2 *Vern.* 510.

IV. The deed of trust is void because it shows on its own face that it must necessarily have the effect of delaying the creditors of the assignor. Where an assignment of itself shows that it must necessarily have the effect of defrauding the creditors of the assignors, it is conclusive evidence of a

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fraudulent intent, and the assignment will be held void—1 Edw. Ch. R. 256 ; 3 Paige, 557 ; 11 Wend. 240 ; 5 Paige, 13, 22 ; 23 Wend. 653 ; 9 Johns. 337 ; 11 Wheat. 59 ; 6 Hill, 438 ; 2 Barb. 9 ; 4 Barb. 546.

V. We contend that the deed of trust is void because the conveyance was made by the president of the company for his own benefit, and for the benefit of James H. Lucas, a director. It takes two to make a contract. No man can convey to himself. In fact, both McCune and Lucas were directors and large stockholders at the time of the execution of the deed of trust. A conveyance of land by the corporation to two of its directors is void as against creditors of the corporation—Cleveland v. Lacrosse R.R., 7 Am. Law Reg. 536, and authorities cited.

VI. The deed of trust is void because it was used as a device to continue the business of the assignors uninterrupted by their creditors. The resolutions passed by the Pilot Knob Iron Company, February 4, 1862, say that "Mr. McCune, the president of the company, made a report of the condition of the company's affairs, showing the assets and liabilities, and character of both ; and recommended to the board, as the true policy of the company, in view of its large liabilities, and the present low price of pig iron, that any large sale of pig iron be postponed for some months, as the indications were favorable to a rise in the price of the article."

An assignment cannot be used as a device to continue the business of the assignor, uninterrupted by his creditors—5 Add. & Ell. 28 ; 7 Md. 380 ; 7 How. (U.S.) 276 ; 7 Serg. & R. 219 ; 9 Sm. & M. 394 ; 6 Rob. 246 ; Zeigler v. Maddox, 26 Mo. 575.

The substance of the oral testimony is, that the motive of making the deed of trust was to keep the iron out of the market until it would bring a better price, and in the mean time to carry on the iron works for the benefit of the company. Some of the witnesses explain this conduct by saying that it was to keep the property from being sacrificed, by keeping

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the property out of the market until it would bring enough to pay all the debts.

The proceedings and resolutions of the board of directors, and the testimony of all the witnesses, when taken together, show that the whole transaction was to make the creditors wait until the iron would bring a better price, and to enable the company in an indirect way, through "go-betweens," to carry on their business in defiance of their creditors. All of which was a fraud in law on the creditors, and made the deed of trust void.

If the deed of trust in the case at bar had been a general assignment of all the property of the Pilot Knob Iron Company, it would have been void, because the trustee did not comply with the law concerning assignments, in giving bond and security, and in doing all things required by the law. To apply, therefore, the decisions concerning fraudulent conveyances to the deed of trust at bar, it is void, for the reasons herein fully explained; and to apply to it the law concerning assignments, it is void, because the law has not been complied with: so it is void, under any and all circumstances.

HOLMES, Judge, delivered the opinion of the court.

There was some discussion as to whether the instrument in question here was to be considered as a deed of trust in the nature of a mortgage security for a debt, or a partial assignment for the benefit of creditors. It does not purport to be a security for a debt, with power to sell if the debt be not paid when due. It conveys the property absolutely to trustees, to be sold for the payment of the debts named and preferred in it. It is clearly a partial assignment for the benefit of creditors, and not a mortgage security. Such instruments have always been treated as assignments—*Gale v. Mensing*, 20 Mo. 461.

The decision of the case depends upon the validity of the assignment as against an attaching creditor. The evidence

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in the case, and the instructions asked for on either side, were such as to raise the general questions of fraud in law on the face of the instrument, and of fraud in fact for the determination of the jury.

In general, every man has a right to convey and dispose of his own property in any way he pleases; but where the relation of debtor and creditor exists, especially if there be numerous creditors, and the affairs of the party be in an embarrassed condition, an assignment for the benefit of the creditors, partial or general, of the greater part or of the whole of the debtor's property, cannot be made the means of covering up and preserving it for his own use, or of withdrawing and protecting it from the lawful actions, remedies, and demands of his creditors.

The statute, since the 13 Eliz., ch. 5, called the statute of frauds, utterly prohibits any such fraudulent conveyance. It declares that every assignment that is made and contrived with intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, shall be deemed and taken, as against creditors, to be clearly and utterly void—R. C. 1855, p. 802, § 2.

Where such fraudulent intent is shown by the very terms, provisions and trusts of the instrument itself, it will be declared void, as a matter of law. But the fraud must be apparent. It is not enough that it may tend, in some measure, to hinder or delay creditors. Such must be the necessary effect of every assignment, to a greater or less extent. It must occasion such hindrance or delay as manifestly to work a fraud upon the rights of creditors, or make the assignment operate not merely for the interests of the beneficiaries in it, but also for the open or secret use and benefit of the grantor himself. An intent to defraud, as well as to hinder and delay, must appear in order to make it void—Gates v. Labeaume, 19 Mo. 17. The very essence of the fraud consists in its not being made *bona fide* for the payment of honest debts, but for the advantage of the grantor, upon secret and fraudulent trusts for his use, and for the

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purpose of postponing or defeating the just claims of creditors.

An assignment may be void in whole or in part as being in contravention of the statutes. In England, an assignment which conveys the whole or so large a part of the debtor's property as to render any further prosecution of his business impracticable, is held to be an act of bankruptcy and void, as made in contravention of the bankrupt act; and the property assigned will be thrown into a course of administration under that act. In this State we have no bankrupt law, nor any insolvent laws, properly so called; but we have an assignment act, and it has been uniformly held by this court, that every assignment of this nature comes within the purview of that act, and that the property assigned must be disposed of, and the trust executed, in pursuance of the provisions thereof—*Manny v. Logan*, 27 Mo. 528.

Provisions that are in conflict with that act will be held void for that very reason; but if otherwise valid, they will be carried into effect, in pursuance of the provisions of that act. It is quite apparent that this assignment was made without any reference to the assignment act; but that alone will not render it fraudulent and void, as against creditors. An assignment of this kind is considered as made upon a meritorious and valuable consideration as between the grantor and the beneficiaries in it, and it will be carried into effect so far as it can be done in accordance with law.

In all such cases, the question will still remain, whether the provisions and trusts of the assignment are of such a character as to show on their face an intent to defraud creditors. In this case, there is no express reservation of any interest, use or advantage in the property assigned by the grantor, not even of the surplus, if there should be any, nor of any direct control over it for his own benefit. There is no express intent to place the property beyond the reach of creditors for the purpose of covering it up and securing it for the use of the grantor, or so as to deprive his creditors of their lawful actions. If there be any such intent, it must result as

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a presumption of law from the necessary operation and effect of the provisions contained in it. It provides, among other things, that the trustees shall take immediate possession, and proceed to dispose of the property "at public or private sale, as to them may seem most advantageous, and on such terms and for such prices as they may deem proper, after consulting with the principal holders of the notes and bonds" described in it; that they "may make any such agreement or arrangement as shall be deemed reasonable" with the creditors named; that they may call in question the amounts of the several debts, and, if necessary, have them adjusted in courts of law or equity; that they may sell at any time at public sale or vendue, for cash, or part cash and part on time, as to them shall seem best," on twenty days' notice; and that they shall apply the proceeds to the payment of the debts named and preferred equally *pro rata*.

Some of these provisions are in conflict with the assignment act, and therefore void so far; and some are not. The clause giving preferences *pro rata* is in conformity with that act. The power given to sell at public or private sale, and for cash, or for part cash and part on time, though evidently intended to be independent of the statute, is yet not materially in conflict with the provisions of that act in respect of sales by assignees, under the order of court, which may be public or private, and for cash in hand, or upon such reasonable credit and security as the court may direct. (§ 31.) In these respects, this assignment is not only not against the policy of the act, but the act itself may be taken as a legislative recognition of the propriety and justice of such a course of proceeding in such matters.

As to the question in general, whether the giving of a power to sell on credit will, of itself, make an assignment void as against creditors, there is much conflict in the authorities. In some States, and especially in New York, it has been decided that it will; in others, that it will not. The statutes and policy of different States may be somewhat different on this subject. It is certain, that the courts of this State have

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hitherto shown a strong desire to uphold assignments for the benefit of creditors, where it could be done in conformity with principles of law; and in this respect no difference is made between partial and general assignments. Much depends on the nature of the particular case. Fraud is indeed the same thing in the largest as in the smallest transaction. But it is certainly proper to consider the nature of the transaction, the kind and description of property conveyed, and the propriety and fitness of the trusts, powers and things to be done in the given instance; and all the provisions may properly be considered together in determining whether, on the whole, they must necessarily have the effect to work such hindrance and delay as actually to defraud creditors. There is a vast difference between the assignment of a small store of goods, and a conveyance of an immense amount of property, consisting of real estate, iron-works, furnaces, and cumbersome and expensive machinery, enormous quantities of ores, coal, pig iron, and other heavy material or materials in the actual process of manufacture, for the payment of a few very large debts, and especially where the entire property is not conveyed, where the grantor is not shown to be in an utterly insolvent condition, and where property enough may still remain for the ultimate liquidation of all indebtedness. In such a case as this, we cannot say that these provisions and trusts were unreasonable with reference to the best interests of the creditors themselves, nor that they must necessarily operate for the use and benefit of the grantor, or unjustly hinder or delay and defraud the other creditors of their lawful actions. Such a conclusion would require a greater stretch of construction than the reason and justice and whole nature of the case will warrant. It does not appear that the property conveyed was more than was necessary for the discharge of the debts provided for. It cannot fairly be inferred that the object and intent were to lock up the property for the use of the grantor, or defeat and defraud creditors.

Particular objection is made to the provision about making such agreements and arrangements with the holders of

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securities as might be reasonable. Where such authority goes so far as to give a power to compound with creditors in such a manner as to change the order of preferences, or to perpetuate in the assignees the right of giving preferences in future, or gives an arbitrary power to force creditors into terms different from those of the instrument itself, under penalty of being denied the full benefit of the assignment, it might very well be declared fraudulent, and void for that reason. Where there was a provision that the assignee might liquidate or compound by making over the choses in action, debts or accounts in payment of demands, the assignment was held not to be therefore void—*Burr, Assign.* 221. This would seem to have been a reasonable authority, and a power that might be exercised without express grant; and the clause in question here may receive a like interpretation, there being nothing to indicate that it was intended otherwise than for the interest and benefit of the creditors preferred, according to the discretion of the trustees. Nor can the deed be held void merely because members of the corporation are among the creditors provided for. But if it could be proved that under cover of such a provision, collusion, covin and fraud were actually designed, and attempted to be carried into effect, for the use of the grantor, to the prejudice of the rights of creditors, that would be a matter of fact for the jury, on the evidence.

It is insisted also that the whole scheme of an assignment was resorted to and contrived as a device for the purpose of enabling the corporation to cover up and protect its property, and to continue its business uninterrupted by its creditors, and especially to withdraw the property from sale until the markets should be more favorable. Upon evidence tending to prove that such was the case, it would be a question of fact for the jury. No such intent is necessarily to be gathered from the terms of the instrument alone. In *Bodley v. Goodrich*, 7 How, U. S. 276, some such purpose was expressed in the assignment.

It is not to be denied that there was some very important

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evidence, extraneous to the instrument, having some tendency to show an actual intent to put the property beyond the reach of creditors in general, to lock it up in the hands of trustees who remained under the influence and control of the grantor, in order that by collusive arrangements they might be able to keep the property out of the market until there should be a rise of prices, or a better demand, and to prevent it being subjected to forced sale and sacrifice under execution ; that one object was to save and protect the property for the benefit of the grantor, or to gain time to enable the parties to make other arrangements for the satisfaction of creditors ; that the discretion and powers given to the trustees were purposely left open and vague in order that it might be in their power to compel the creditors to come into such arrangements as they should propose ; that the form of the instrument was made to be an assignment instead of a mortgage, as contemplated by the board of directors which authorized it to be executed, and for the purpose of enabling influential members of the corporation even to destroy the corporation itself and reorganize it under the same charter with a new company, and procure a transfer of the property to the new company discharged of the debts of the old company ; that it was not contemplated that the property should be administered and disposed of under the assignment act ; and that all this was further shown by the subsequent proceedings. Now, if it could be proved to the satisfaction of a jury that such was the object and intent of the grantor, the assignment should unquestionably be declared fraudulent and void as against creditors. If it were devised and contrived as a scheme for keeping the property under the secret control of the grantor, the corporation itself, or for keeping it out of the market for an indefinite period of time, or for putting it beyond the reach of legal process at the suit of creditors, or locking it up in any way for the grantor's own use and benefit ; if it were not designed in good faith for the payment of honest debts really owed, but the whole transaction were conceived in collusion, malice, covin and bad faith,

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and tainted with secret fraud ; and if these facts were proved to the satisfaction of the jury, they ought to find it fraudulent and void as against an attaching creditor.

It would come clearly within the prohibition of the statute of frauds ; nor would it require much evidence beyond the proof of these facts to implicate the assignees in the fraudulent intent, for such could hardly be the nature of the transaction without their knowing it, and lending themselves to the accomplishment of the fraud. As to honest creditors, the beneficiaries of the trust, the consideration might be meritorious and valuable, so far ; but even an assignment for a good and valuable consideration may be vitiated by a fraudulent purpose and intent. The statute declares that every assignment which is made for the purpose of defrauding creditors shall be utterly void. And where the instrument is not void on its face, but the property assigned is afterwards dealt with in a manner pursuant to a fraudulent scheme and purpose, in fact, contemporaneous with the execution of the assignment, very slight additional evidence should be required to prove that such dealing was the result and a part of some secret arrangement to that effect between the parties ; and such a proceeding should stamp the transaction with *mala fides* and constructive fraud as effectually as if it had been embodied in the express provisions of the instrument—Reed v. Pellesier, 28 Mo. 173.

The case of Pinneo v. Hart, (30 Mo. 569,) is distinguishable from a case of this kind. There the whole property of the debtor was assigned for the benefit of all his creditors, and some false and fictitious debts had been inserted in the schedule. It was considered that the lawful object could be carried into effect under the assignment act notwithstanding these fictitious debts, and that the property might be applied to the honest purpose of paying the debts of all the creditors. It was thought that in such case there was no one who could be actually defrauded, and it was held that the mere fact that a fictitious debt was inserted in the schedule was not enough to make the whole assignment void, and leave the

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property to a general scramble. We do not take it as authority to the point, that an assignment proved to have been contrived and concocted in fraud of the lawful actions of creditors, or for the secret use and benefit of the grantor himself, would not render it utterly void as against creditors. The assignment act is made for honest and valid assignments, and not in any manner to uphold fraudulent assignments. It does not repeal nor modify or change the statute of frauds. Where such a fraudulent purpose on the part of the grantor is clearly proved to exist, it cannot be presumed that the creditors assent to the fraud, or in any manner become parties to a transaction which is tainted with fraud in its inception, or if they do, they should be held to be participants and parties to the fraud also. Such would seem to be the intent of the statute of frauds. The assignment act declares, that all preferences within the provisions of any assignment shall be void, and that all creditors named in it shall be paid *pro rata*. This applies to all assignments whether partial or general. In case of general assignments, it will operate as an absolute prohibition of any preferences whatever. But it is still in the power of the assignor to give preferences, by making a partial assignment only. Preferences are most generally the very object and purpose contemplated in making such assignments. But if parties will still undertake to give preferences in this way, they must take care to keep clear of the statute of frauds. They must be absolutely and fairly made for the genuine purpose of paying honest debts, and not for the use and benefit of the grantor, nor to hinder or delay other creditors in the prosecution of their lawful actions and just rights, beyond what is necessary for the accomplishment of the legitimate object of paying just debts.

There was some evidence here tending to show such fraud in fact. The defendants had a right to have this question submitted to the jury, under proper instructions. We do not think this was fairly done by the instructions which were given by the court below. To the first and second instruc-

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tions given for the plaintiff, there would seem to be no serious objection, except that the first one supposes a purpose of securing genuine debts, apparently treating the instrument as a mortgage security for a debt. In this it was not entirely accurate; but the main object of it seems to have been to declare that the assignment was not fraudulent and void on its face; and in this respect we think it was correct enough.

The plaintiff's third instruction put the whole case to the jury on a narrower issue than was just and proper on the whole evidence. It declared, in effect, that if the deed was made for the purpose of securing genuine debts, then the property conveyed was not liable to attachment. Now that may have been one purpose, but not the only purpose. That might be strictly true, and yet the assignment may have been fraudulently made. There was evidence tending to prove fraud in fact, independent of the instrument. The instruction excluded all this part of the case from the consideration of the jury. It has been several times held by this court, that it is error to give an instruction for the plaintiff which wholly takes away from the jury the consideration of a material issue for the defence, when there is evidence tending to support it. The jury must be allowed to pass upon all material facts and issues.

We need not undertake to review in detail the numerous instructions which were refused for the defendants. It might require us to write a treatise on the whole law of assignments. It can scarcely be necessary for skilful counsel to ask such a multiplicity of instructions, when the substantial issue of fact can be more clearly presented to the jury in a few definite legal propositions. We think the defendants were entitled to have the question of fraudulent intent in fact submitted to the determination of the jury, in accordance with the principles above indicated; and under this head, the fifth, sixth and eighth instructions might have been given. Others were objectionable in singling out a part of the evidence, or a particular fact, and declaring that such particular facts constituted fraud, when they only tended

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to prove fraud, of which the jury should have been left to judge as a matter of fact. It was not necessary that the trustees should actually sign the instrument, if they otherwise accepted the trust. Possession must be according to the nature of the property. An actual delivery of possession was not necessary to make the assignment valid, the assignment being delivered and recorded. The plaintiffs, if entitled to recover at all, were entitled to recover the whole amount of their damages.

The judgment will be reversed and the cause remanded. Judge Wagner concurring; Judge Lovelace absent.

CHESTER H. BREWSTER *et als.*, Respondents, *v.* CHARLES W. GAUSS *et al.*, Appellants.

Trespass—Damages—Attachments.—Where several attachments are successively levied upon goods not the property of the attachment debtor, the attachment creditors are not joint trespassers, and are not liable to contribution as such (R. C. 1855, p. 649); but where several creditors, thus attaching, were sued as joint trespassers, and judgment recovered, the judgment is conclusive as to their liability to contribution.

Appeal from St. Louis Circuit Court.

Knox & Smith for appellants.

Krum & Decker, for respondents.

HOLMES, Judge, delivered the opinion of the court.

It appears that several attachments, at the suit of different parties, were levied in succession upon certain goods and chattels as the property of Aaron Jacobs & Co., the defendants therein; that the property attached was claimed by Keiler & Isaacs, who afterwards brought an action of trespass against all these attaching plaintiffs, jointly, as for a joint trespass, and recovered judgment against them for \$1,918.90, damages and costs; that in the attachment of Brewster, Orrick & Co. judgment was obtained, and satisfied out of the

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goods attached to the amount of \$1,358.52, and that a small part of the proceeds remained over to be applied on the next attachment; but that the attachment of Fallenstein & Gauss, of which firm the defendant here was one, realized nothing, and that the judgment in favor of Keiler & Isaacs, against the joint trespassers, was satisfied by the plaintiff Brewster, as one of his firm. He now brings this suit, in the nature of a bill in equity, against the defendant here, to enforce a contribution towards the amount of the judgment which he has paid.

It appears that the excess of the judgment paid over and above the amount realized on the attachment of his firm was \$560.38, and that the defendant's proportion of the difference between the two judgments would be only about \$70.05. The defendant insists that he can be compelled to contribute only in that proportion. By the judgment of the court below, he was compelled to contribute to the whole amount of the judgment.

The plaintiff relies upon the statute of Damages, which provides that in a judgment founded upon a private wrong, the joint defendants shall be subject to contribution in the same manner and to the same extent as in a judgment in an action founded on contract—R. C. 1855, p. 649, § 8. We think the statute is general in its nature, and applies to all judgments of this character. But on the facts appearing here, there is no equity in the plaintiff's case, beyond the amount which he has been compelled to pay over and above what he realized on his attachment. The several attaching plaintiffs were in no proper sense joint trespassers at all. But no appeal or writ of error appears to have been taken to correct the errors of that judgment, and it must be held here to be conclusive upon the parties as to the joint trespass. The plaintiff now appeals to the equitable jurisdiction of the court, to enforce a contribution toward the whole amount of that judgment. The facts show that his firm has realized the fruits of the joint trespass to the amount above specified, and that the plaintiff has really paid only the difference of the two

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judgments. He that asks equity must do equity. It would be clearly inequitable and unjust to allow him to pocket the fruit of his attachment, and the joint trespass, and then for this defendant, who realized nothing, to contribute to the whole of a judgment, which he has really paid only in part, though nominally in whole. We must hold that the defendant is liable only for his proportion of the excess.

Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Lovelace absent.

THOMAS H. SCALES *et al.*, Respondents, *v.* THE SOUTHERN HOTEL COMPANY, GARNISHEE, &c., Appellant.

1. *Witness.*—The judgment debtor is a competent witness for the plaintiff in an execution in the proceedings against a garnishee upon execution. He is not a party to the immediate record, neither is he an assignor, within the meaning of the statute.
2. *Execution—Garnishment.*—In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand, unaffected by liens or prior encumbrances, or conditions of contract.

Appeal from St. Louis Circuit Court.

The Southern Hotel Company was summoned as garnishee upon execution in favor of plaintiffs, of McBride & Thornburg (a firm composed of Joseph H. McBride and Joseph W. Thornburg), on November 13, 1862. At the return of the *fi. fa.*, the plaintiffs filed fifteen special interrogatories to be answered by the garnishee, inquiring into all of the transactions between the garnishee and defendants. The defendants had been the contractors with the hotel company for doing the brick work of the hotel, and the contract had not been completed at the date of the garnishment. At the time of answering, the contract had been closed; the account of the defendants as against the garnishee amounted to \$44,318.67, and the account of the garnishee, for moneys paid and assumed and charged to defendants, amounted to \$45,169.69, showing a balance against defendants of \$845.02.

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The sixth, seventh and eighth interrogatories inquired, whether any moneys, orders, &c., had been paid since the date of the garnishment. To these the company answered that it had paid moneys to defendants, and their sub-contractors and workmen, in order to prevent liens being filed upon their building. They paid defendants, to be paid to workmen, the payment being thus applied and paid workmen, under superintendence of the agent of the company, November 29, 1862, \$412.90; December 6, 1862, \$67.55; making a total of \$480.45.

In answer to the seventh interrogatory the company answered, that it had undertaken to see to the payment of the material men, and had paid for materials furnished to the building :

November 20, 1862, F. Walkenhorst, for brick,	- - - - -	\$365 60
December 2, 1862, W. Stell, " sand,	- - - - -	78 00
" 4, 1862, H. Spelman, " brick,	- - - - -	56 00
" 4, 1862, J. H. Locke, " lime,	- - - - -	151 20
" 27, 1862, C. Best, " brick,	- - - - -	474 60
January 26, 1863, Plaintiffs, " "	- - - - -	544 00
		<hr/> \$1,669 40
Making with the sum paid workmen,	- - - - -	480 45
Paid after the garnishment,	- - - - -	<hr/> \$2,149 85

Inquiry was made as to liens, none of which were filed or paid, except one, that of plaintiff, for \$544.

The garnishee denied all indebtedness to defendants, and alleged that it had overpaid defendants. The replication alleged that the sum of \$1,669.40 was illegally paid after garnishment, and alleged a general indebtedness. To this there was a rejoinder. At the trial the only dispute was as to the payments made after the date of the garnishment, November 13, 1862, and a draft of J. Thornburg accepted by defendant J. W. Thornburg in favor of the company, November 19, 1860, and payable out of the money due on the contract at its final payment. This draft was charged against defendant November 19, 1860. At the trial the garnishee offered in evidence to prove, that the persons to whom they paid

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money after the garnishment, the building not being completed, had the right to file liens upon the building, and also, that the company had agreed with defendants upon the resumption of work in 1862, that, to avoid liens, it would see to the payment of the material men and laborers, and that it had paid them all along upon orders and receipts of defendants. It also gave evidence tending to prove that both defendants assented to the acceptance of the Thornburg draft.

The plaintiff called the defendant J. H. McBride as a witness, to whom the garnishee objected because he was a party to the record, and a party for whose benefit the suit was prosecuted. The objection was overruled, exception taken and saved.

The garnishee objected to McBride testifying to any matters occurring prior to the garnishment, as he was the assignor of a chose in action, and incompetent. The objection was overruled, exception taken and saved.

The court, before whom the case was tried, found that all the payments made by the garnishee after the garnishment were made in its own wrong, and that it was indebted in the sum of \$2,148.85, and ordered it to pay plaintiffs \$1,034.13 and \$38.05 costs. The garnishee filed its motion for a new trial, which being overruled and judgment given, it appealed.

Whittelsey, for appellant.

I. McBride was not a competent witness for plaintiffs.

a. He was a party to the record, in the same manner as if he had sued the garnishee himself. The record would be evidence against him. He is but the cat's paw in the monkey's hands—R. C. 1855, p. 1577, § 6; Pratte v. Coffman, 33 Mo. 71; Patrick v. Steamboat Adams, 19 Mo. 73; Kanes v. Pritchard, 36 Mo. 135.

b. If not a party to the record, and the suit was not for his benefit, he must be considered as the assignor of a chose in action, incompetent to testify as to any facts occurring antecedent to the garnishment—R. C. 1855, p. 1577, § 6; Gardner v. Clark, 17 Barb. S. C. 548.

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II. The court erred in its finding, that the garnishee paid the laborers and material men, after the garnishment, in its own wrong. There was no issue as to the fact of payment after garnishment. That was admitted. The building had not been completed at that time. The evidence showed that these parties could have filed their liens and enforced payment—Sess. Acts, 1857, p. 668, §§ 1, 2, 3 & 19. The garnishee could not equitably be required to wait until the liens were actually filed and litigated. The lien commenced with the building, and continued until thirty days after completion for laborers, and four months for material men. McBride and Thornburg were insolvent, as appears by the return that no property could be found to make the debt, as well as from the evidence. The creditor can have no greater right against the garnishee, than the defendant in the execution—Drake on Att. §§ 414-5, 677, 696; Firebaugh v. Stowe, 36 Mo. 111. By the mechanics' lien act, 1857, p. 668, § 19, after liens filed, the owner could withhold payment to the contractor. Is not his equity to refuse payment just as good when the contractor is insolvent, and he knows that he will be compelled to pay the material men and laborers, and he does pay them to avoid costs and litigation?

III. The defence, that he had by agreement with the contractors assumed these payments, having been declared as a matter of law against the garnishee, the point is made upon that finding, that the court erred in holding that no defence.

Alex. H. Martin, for respondent.

I. The company was not justified in making the payments:

1. Because it does not appear the payments were made to sub-contractors who had any rights as lien-holders.
2. Because if the sub-contractors had any rights, they had not taken the steps, such as giving notices and filing liens, which constitute them lien-holders, and which steps alone can justify the owner in detaining or paying his dues.
3. Because the payments were not made in compliance with any contracts with McBride & Thornburg.

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4. No contract with McBride & Thornburg could justify them (the company) in paying after the garnishment. It must be with the sub-contractors.

II. The Thornburg draft should be rejected:

1. Because McBride did not assent. 2. If he did, there is no consideration to it, and he is not bound. 3. If he did assent, it is void, as not being in writing. 4. Only John W. Thornburg accepted the draft, and this bound him only, and his individual interest in the last payment. 5. This individual interest in the last payment must be subject to the payment of the debts of the firm of McBride & Thornburg, of which ours is one.

HOLMES, Judge, delivered the opinion of the court.

This is an appeal from the judgment of the St. Louis Circuit Court, rendered against the defendant, as garnishee under execution issued upon a judgment in favor of the plaintiffs against McBride & Thornburg. The issues were found for the plaintiffs, and judgment was given against the defendant for the sum of 1,072.18, the amount of the execution, with interest and costs thereon. There was no instruction, but a motion for a new trial was overruled, and exception was taken to the admission of the testimony of McBride, one of the defendants in the execution, offered as a witness for the plaintiff.

The questions presented for decision here would seem to be these only: First, whether McBride was a competent witness, and second, whether the finding and judgment were sustained by the evidence.

We think the defendant in the execution was a competent witness. Proceedings in garnishment constitute a separate record. There is a distinct trial, and the issues are to be tried and the parties adjudged to pay or recover, as in ordinary cases between plaintiffs and defendants. In garnishment on execution, the proceedings are to be the same as under attachment. The defendant in the execution is not a party to the immediate record. His interest in the event of the

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trial does not exclude him. Neither can he be considered an assignor within the meaning of the statute, which excludes an assignor from being a witness. We see no good reason for excluding his testimony.

The finding of the court appears to have been well warranted by the evidence. With respect to the draft of Josiah Thornburg, the evidence does not show that it had ever been allowed as a payment on the account of McBride & Thornburg. It could not be taken into that account without the assent of McBride, which does not appear to have been given in a way to conclude him. He stated positively that he never did consent.

With regard to the amounts paid out to sub-contractors after service of garnishment, it did not clearly appear that at the times of payment they were demands which could have become liens under the statute. No notices of lien had been given. We must hold the finding of the court to have been correct until the contrary is made to appear. In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand, unaffected by liens, or prior encumbrances, or conditions of contract; but the evidence here failed to show any such contract for the payment of this money to the sub-contractors or others as would prevent it from being subject to garnishment as money due the defendant in the execution.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

WALTER B. FOSTER, Respondent, *v.* JOHN C. POTTER, IM-
PLEADED, &c., Appellant.

1. *Attachment—Corporations—Stocks.*—Shares of stock in an incorporated company cannot be levied on by an attachment. The statute of this State has not changed the common law rule in such cases.
2. *Executions—Corporations—Stocks.*—Under the statute relating to executions—R. C. 1855, p. 742, §§ 23, 24—shares of stock in an incorporated company belonging to the defendant in the execution may be seized and sold by the sheriff in the manner provided in the act.

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3. *Corporations—Stocks—Mortgage—Execution.*—The equity of redemption of a judgment debtor in shares of stock may be levied upon and sold under execution, and the purchaser will succeed to all the rights of the debtor.

Appeal from St. Louis Court of Common Pleas.

Knox & Smith, for appellant.

The appellant insists that the well recognized principles of the common law, that the interest of the mortgagor in goods and chattels mortgaged by him cannot be seized under a writ of attachment, or sold under execution, are not at all applicable to the case of stocks or shares in incorporated companies; such shares and stocks could not, at common law, be sold under execution.

The statutes of Missouri expressly authorize the seizure, under writs of attachment and execution, of choses in action, and the sale of "the rights and shares" of the debtor in the stock of corporations, &c.—R. C. 1855, p. 245, § 22, subd. 4; p. 247, § 28; p. 244, § 19; p. 742, § 24; p. 740, § 17; p. 741, § 18; p. 748, § 55.

By reference to the above provisions of the statutes, it will be seen that "rights and shares in the stock of incorporated companies" are subject to sale under execution; the manner of the levy and sale is distinctly provided for. After a sale, the purchaser is substituted for the debtor in all "rights and shares" the debtor may have in incorporated companies.

Even at common law, shares in the stock of a corporation were not regarded as other personal property, for the reason that such shares were intangible, and the officer could not actually seize them, or take them into his possession—5 Ed. Ang. & A. Corp. §§ 589, 590; 16 Mass. 318, 402.

Grover, for respondent.

I. It is insisted that by the execution of the deed of trust by McDowell to Foster, and the transfer on the books of the Pacific Insurance Company, the legal ownership of and title to the one hundred shares of stock passed from McDowell to Foster, leaving to McDowell a mere equity of redemption.

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II. This equity of redemption was not subject to seizure or sale under an attachment or execution at law, and Potter acquired no right or interest in said stocks by virtue of the sheriff's sale and deed, under which he claims title.

III. At the time of issuing the last execution in favor of Lyon et al. against McDowell, and of the garnishment of Foster under said execution, and of the commencement of the suit by Lyon and others to compel the appropriation of the funds in the hands of Foster to the satisfaction of their judgment and execution against McDowell, no steps had been taken by Potter to enforce any supposed right which he had acquired under the sheriff's sale of said stocks.

IV. Until the sale of stocks by Foster on the 31st December, 1862, the interest of McDowell therein was purely equitable. By that sale all his interest in the stocks became divested, and the deed to Foster out-dating all attachments and executions, the sale by him conveyed a good title to the purchaser, unaffected by any of the attachments, judgments, or executions, through which Potter claimed to have derived title.

V. If the balance in Foster's hands is to be treated as an equitable fund, then Lyon and his co-plaintiffs in said judgment have secured by the commencement of their suit on the 20th March, 1863, their right in equity to have the fund appropriated to the satisfaction of their judgment and execution. (*Sexton v. Marks*, 16 Mo. 156; *Yeldell v. Stemmons*, 15 Mo. 443; *Boyce v. Smith*, 16 Mo. 317.)

HOLMES, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity to compel the parties defendant to interplead and establish their rights to a fund held by the plaintiff, and which he is ready to pay over to the party entitled to it. It appears that the firm of J. & W. McDowell, owners of certain shares of stock in the Pacific Insurance Company (of which John McDowell afterwards became sole owner), gave to the plaintiff, as trustee for the benefit of the corporation, a deed of trust in the

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nature of a mortgage upon this stock, to secure the payment of certain notes held by the company. The deed was duly executed and recorded, and the transfer was entered on the books of the company, and signed by the grantors. Afterwards, the defendant Potter caused an attachment to be levied upon these shares of stock as the property of McDowell, and other attachments followed. The manner of the levy does not appear; but judgments were obtained in the attachment suits, and executions were issued thereon, under which this stock was levied upon and sold by the sheriff, in pursuance of the act concerning executions, as the property of McDowell, the defendant therein, Potter becoming the purchaser; and an instrument in writing was executed and delivered to him by the sheriff, as provided by the statute, purporting to convey all the interest of McDowell in these shares of stock. Subsequently to these proceedings, and when the notes became due, there was a sale by the trustee under the deed of trust, which realized a balance, over and above the debt secured, amounting to \$1,644.46, which sum remained in the hands of the trustee. Some time after this, the trustee (the plaintiff here) was garnished as the debtor of McDowell, under an execution issued upon a judgment in favor of John Lyon and others against him; and while proceedings in the matter of the garnishment were still pending, this suit was commenced against all the parties concerned. The court below ordered the fund to be paid to John Lyon and others, and Potter was decreed to pay the costs of the suit. Potter appeals to this court. The court below refused to instruct the jury for the defendant Potter, to the effect, that the levy of the attachment (in the manner provided in the act concerning executions) created a lien upon the balance of the proceeds of the trustee's sale after payment of the notes secured, and that the levy and sale to Potter, under the executions issued in the attachment suits, gave him a good title to the fund remaining in the hands of the trustee; and further, that the equity of redemption in the shares of stock was subject to levy and sale in the same manner as the shares

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themselves would have been, if they had been standing in the name of the defendant without any encumbrance thereon.

The statute subjects shares of stock in incorporated companies to levy and sale under execution, and prescribes the manner in which the thing may be done; but there are no such provisions in the act concerning attachments. At common law, such property could not be the subject of attachment or execution. This principle has been recognized by this court, and applied to a levy under execution upon an equity of redemption in movable personal chattels, where the mortgagor retained nothing more than a permissive possession, determinable at the will of the mortgagee, or upon an equitable interest in personal property assigned; and it has been held that such mere equitable interests could not be reached by process of law, nor be bound by execution, and that no title or interest in the chattels could pass to the purchaser under such levy and sale, even where the chattels were actually seized by the officer and delivered to the purchaser—*King v. Bailey*, 8 Mo. 332; *Yeldell v. Stemmons*, 15 Mo. 443; *Boyce v. Smith*, 16 Mo. 317. The defendant in the execution having no property in the thing, but a bare possession only, no interest could pass to the purchaser; and a mere right of redemption could not be actually seized. An attachment creates a lien upon property that can be attached and seized, or garnished; and a sale under execution, in such case, will be effectual to pass the property levied on, where such lien exists. It is not made to appear in what manner this attachment was undertaken to be levied on these shares of stock. The statute provisions, authorizing a levy of an execution, did not therefore authorize the levy of an attachment also. In general, stock owned by an individual in a corporation cannot be subjected to the payment of his debts by the process of attachment, nor by garnishee process, served on the corporation. Such property is neither a specific chattel, nor a debt, but a mere chose in action. A certificate of stock is merely an evidence of an interest or property owned in the corporation, but not of a debt due as a liquidated money de-

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mand—*Planters' Bank v. Leavens*, 4 Ala. 753 ; *Titcomb v. Union Mar. Fire Ins. Co.*, 8 Mass. 326. It does not appear that any certificate was actually seized. The property interest of the shareholder is an intangible and invisible thing, and cannot be actually seized by the officer. There can be no change of possession ; and the sale of such interests under execution or attachment was a mode of transfer unknown to the common law—Ang. Corp. § 588. The attachment act provides no method by which a levy can be made. It is clear, therefore, no levy of this attachment could have been made that would be valid and effectual as such.

The statutes of some States make special provision for the levy of an attachment upon such shares of stock. Our statute authorizes a levy upon books, accounts, notes, bonds, certificates of deposit, evidences of debt, and real and personal property ; and provides that when such things are to be attached, the officer shall take the same and keep them in his custody, if accessible ; and if not accessible, he may summon the person in whose possession they are, if in their nature seizable at all, as a garnishee. Neither shares nor certificates of stock in a corporation come under any one of these specifications otherwise than as chattels, or personal property. A certificate, as a chose in action and a chattel, might be seized, but stock, as personal property, could not be seized. It would seem to be very clear, that this kind of property is by its very nature wholly inaccessible to actual seizure by an officer. He could not take it into his custody. Nor can the corporation be said to have possession of it, as an article of property belonging to the defendant, in such manner that the corporation could be summoned as a garnishee. A garnishee may discharge himself by paying the debt into court, or delivering up articles of property in his possession as a garnishee, to the officer, to be disposed of under the order of the court. Nothing of this kind could be done here. We must conclude that the statute has not changed the common law rule in relation to the levy of an attachment upon shares of stock.

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But the act concerning executions does provide a specific mode in which shares of stock in incorporated companies may be levied upon and sold under execution; and an execution upon a general judgment in an attachment suit is to be a common law *in fa.*, and may be levied upon all the property of the defendant (subject to execution), whether attached or not—R. C. 1855, p. 256, § 61. It would appear that these shares were levied upon under executions issued upon general judgments, and sold and conveyed to the defendant Potter, in pursuance of the statute. If the defendant had been the absolute owner of the shares at the time of the levy, there could have been no doubt that the purchaser would acquire a good title by his purchase at the sheriff's sale. The statute provides, that when an execution is issued against a person, "being the owner of any shares or stock" in any corporation, it shall be the duty of the secretary, or other officer, to furnish to the levying officer a certificate of the number of shares held by the defendant, "with the encumbrance thereon" (§ 23); that the levy shall be made by leaving a copy of the writ with the secretary or other officer, with a certificate attested by the officer making the levy, that he levies and takes such shares to satisfy his execution (§ 24); and that when such shares are sold, the officer shall execute and deliver to the purchaser an instrument in writing (a bill of sale) conveying the same, and leave with the secretary a copy of his execution and of his return thereon, and thereupon the purchaser is to become entitled to the dividends and stocks and all the privileges in the corporation which the debtor himself had (55). It is also provided that such shares may be claimed, when levied upon, by any other person claiming an interest or title to the same, as in other like cases. Here is an effectual mode of levy, sale and transfer of all the interest of the debtor defendant, without an actual seizure, or anything like a delivery of the property *in specie*. The purchaser is put into the place of the debtor. The prior rights of the mortgagee are not necessarily interfered with. He may still proceed to sell under his mortgage,

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or he may claim the property before the sheriff, or he may assert his rights in any other way known to the law. His conveyance upon a sale under his power may be effectual to pass the whole property in the stock, notwithstanding the sale under execution. The purchaser takes the property subject to the deed of trust. It does not appear that the notes had become due before the levy and sale under the executions. The deed itself provides that the trustee may sell, after the notes become due, whenever the holders of the notes shall require payment. Under such a deed, the absolute ownership does not vest in the trustee until a forfeiture, or even until an actual sale shall pass the title and interest in the property to the purchaser. He has a conditional legal title, with a power to sell and pass the title or absolute ownership to the purchaser. He can no more have an actual possession, or make a seizure or delivery of possession of the specific property, than the sheriff. Whatever possession or control the mortgagor could exercise over such property still remained with him as before, and was to continue until the trustee should be required to sell. He has thus an equity of redemption, with the possession and control of the property, according to its nature, for a definite period of time. In short, he remained the owner of the stock, subject only to the encumbrance. This encumbrance was noted on the books of the corporation in such manner that the secretary could furnish the levying officer with the certificate required by the statute. The amount of the defendant's interest could thereby be definitely ascertained and rendered certain. The words of the act are not necessarily confined to such claims as the corporation itself may have on the stock for unpaid assessments or otherwise; they are broad enough to include any and all encumbrances.

The decisions heretofore made, as above, related to movable articles of personal property, which may admit of seizure, change of possession, and actual delivery: they contemplate a case where the mortgagor has no right to retain possession of the property for any definite period. In *King v. Bai-*

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ley it was said that the bare possession of a chattel by the mortgagor with the permission of the mortgagee, and determinable at his will, could not be the subject of sale under execution; that such bare possession gave no such interest in the property as could be levied on; but that it was not intended to convey the idea that a certain and determined interest in chattels, accompanied with possession, however limited, could not be sold under execution. The same intimation was repeated in the subsequent cases. The property consisted of slaves, lumber, and the like. It did not appear that the mortgagor had a right of possession for any definite period; nor did the property come under the same provisions of the statute as these shares of stock. The same distinction is clearly made in the authorities therein referred to—Hendricks v. Robinson, 2 Johns. Ch. 283; Bailey v. Barton, 8 Wend. 345. The former case concerned an indeterminate equitable interest in the surplus which might remain in the hands of the assignees after the purposes of the assignment were answered. In both cases it was expressly declared that the principle did not apply where the mortgagor had a right of possession for some definite period; but that where there was an equity of redemption, with such right of possession for a definite period, before the property could become forfeited and liable to be taken and sold by the mortgagee, the mortgagor has an interest which may be levied on and sold under execution, and that the purchaser would take the property subject to the encumbrances—Mattison v. Bancus, 1 Comst. 295. These cases related only to such articles of personal property as may be the subject of actual seizure and change of possession, and they proceed upon the idea that indefinite and uncertain interests are not to be sacrificed under the legal process in this manner, when there is a more suitable remedy in equity; they have no direct bearing upon a case of this kind.

In those States where the statutes authorize an attachment to be levied on shares of stock in corporations, under various provisions, it is held that a levy may be made upon the equi-

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ty of redemption of the mortgagor in such shares, and a sale made subject to the mortgage, even when the mortgage is given to indemnify against uncertain liabilities other than for the payment of money—2 Hill, Mortg. ch. 48. The purchaser under the execution may pay off the prior mortgage, and he will thereby become the absolute owner of the shares—*Forbes v. Parker*, 16 Pick. 462. The surplus arising from the sale of such equity of redemption under an execution is to be held by the officer and paid over to the next in order of priority—*Denny v. Hamilton*, 16 Mass. 402.

At the time of this levy and sale under execution we think the defendant had an equity of redemption, with a right of possession and control for a definite period, and such an ownership and property in this stock as could properly be levied on under the statute relating to executions, subject to the existing encumbrances; and that the sale and conveyance by the sheriff passed to the purchaser the property in these shares, subject only to the prior deed of trust. When the property was sold under the deed of trust for the payment of the notes secured, the surplus remaining over became subject in his hands to a trust for the benefit of the party next entitled thereto. And the purchaser under these executions having acquired the equity of redemption, by the bill of sale from the sheriff, became substituted thereby to the place and right of the mortgagor, and entitled in equity to receive that surplus in his stead. It follows, that at the date of this garnishment of Lyon and others, the trustee was not indebted to the defendant in the execution under which he was summoned as garnishee, but stood indebted, or at least accountable in equity, to the purchaser under the first execution.

This being a proceeding in equity, we see no difficulty in the way of a decree in favor of the defendant Potter, as the party in equity entitled to the funds.

The first instruction refused for the defendant was not entirely correct. The levy of the attachment was unauthorized and void, and gave no lien; but the levy and sale under the execution issued in the attachment suits did create a lien,

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and give a good title to the purchaser, to the extent of the balance of the fund. The other instruction, though somewhat too general in its terms, might very well have been given, upon the evidence before the jury.

Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Lovelace absent.

JOHN MURPHY AND WILLIAM C. ALLISON, Appellants, *v.*
NEWTON S. GAY, Respondent.

Note—Consideration—Contract.—In a suit by payee upon a note given for goods sold, the maker may show in a defence of failure of consideration, that the goods were not as described and warranted at the sale, or that they were worthless for the purposes for which they were sold.

Appeal from St. Louis Court of Common Pleas.

Knox & Smith, for appellants.

G. S. & J. Van Wagoner, for respondent.

I. The want or failure of consideration of a promissory note (as between the original parties thereto) can be pleaded either in whole or in part, and evidence thereof be given, in an action brought to recover the amount of said note—R. C. 1855, p. 1290, § 24.

II. Where a suit is brought on a promissory note, given for a part of the consideration money on the purchase of goods, represented at the time of sale to be good and merchantable, by the payee (the seller) against the maker, (the purchaser,) the latter will not be precluded from having and making his defence of a failure of the consideration of the note, from the fact, that he had not previous to the commencement of the suit given notice to the payee of the defective or worthless character of said goods, or that he had not offered to surrender or return them—R. C. 1855, p. 1290, § 24; Sto. on Cont. (1851) p. 930, § 844; Waring v. Mason, 18 Wend. 436; Batteman v. Pierce, 3 Hill, 174; Boorman v. Jenkins, 12 Wend. 576; Ives v. Van Epps, 22 Wend. 156-7; Cook v. Mosely, 13 Wend. 278; Reab v.

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McAlister, 8 Wend. 115-17 ; McAlister v. Reab, 4 Wend. 490-4 ; Duffee v. Mason, 8 Cow. 26 ; Renard v. Peck, 2 Hilt. C. P. Rep. 137 ; Warren v. Van Pelt, 4 E. D. Smith, 202, &c. ; Wade v. Scott, 7 Mo. 510 ; Barr (assignee) v. Baker, 9 Mo. 840 ; Smith v. Busby, 15 Mo. 391 ; Morrison v. Edgar, 16 Mo. 415 ; Klein v. Keyes, &c., 17 Mo. 328.

III. In such suit the payee of said note can only recover of the maker the amount of the actual value of said goods, at the time they were received by said maker.

HOLMES, Judge, delivered the opinion of the court.

At the time when the plaintiffs' agent received the order from the defendant for the pipe, which was the consideration of the note sued on, he represented that it was "good pipe" and "better than that they were getting" from another manufacturer, and that it was a "merchantable" article. When received, the pipe was placed in store until it should be sold in the regular course of business, without any close examination of its quality. To all appearances it was good pipe. Several months afterwards and after the note given for the price had been renewed with a part payment, and when the pipe came to be sold and used in building, it was discovered to be full of small holes, fatally defective and utterly useless for the purpose for which it was intended. The portions sold were returned to the defendant, and the whole remained in his hands. When the defect was discovered the defendant wrote the plaintiffs informing them of the fact, and stating that he would not pay the note, and that the pipe was subject to their order. Such was the substance of what the evidence tended to prove.

The instructions which were given for the defendant declared in effect, that these representations amounted to a warranty that the article should be a good merchantable pipe, and that the defendant was not precluded from making this defence by reason of his having received the pipe, nor by reason of his not making any offer, or his failure, to return it ; and the plaintiffs' instructions, embodying nearly

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the converse of these propositions, were refused. These statements amounted to a warranty that the thing should be what it was sold for. The authority of the agent to make these representations is not denied. They were made at the time when the order was given, and evidently operated as an inducement, if not the only inducement, to the purchase—*Sto. Sales*, §§ 351, 357; *Duffee v. Mason*, 8 Cow. 26.

The evidence tended to show the pipe was defectively made, unfit for the uses for which it was ordered, and worthless for any purpose but old iron. The delay in making the discovery of its bad quality was satisfactorily explained. The plaintiffs appear to have been notified as soon as the discovery was made. That the defendant had previously renewed the note given for the price, expressed himself satisfied with the pipe, and actually paid for it in part, cannot be considered as a waiver of his legal rights in the matter. The statute provides, that the proper party may prove the want or failure of the consideration, in whole or in part, in such case—*R. C. 1855*, p. 1290, § 24. Nor in order to enable the defendant to make this defence was he bound to return, or offer to return, the goods at all—*Barr v. Baker*, 9 Mo. 840; *Muller v. Eno*, 14 N. Y. 597; *Renard v. Peck*, 2 Hilt. 137; *Warren v. Van Pelt*, 4 E. D. Smith, 202; *Wade v. Scott*, 7 Mo. 509; *Napton, J.*, in *Ferguson v. Huston*, 6 Mo. 425.

We think the motion for a new trial was properly overruled.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

BERTHA HUELSENKAMP, Respondent, *v.* THE CITIZENS' RAILWAY COMPANY, Appellant.

Carriers—Negligence—Damages.—Carriers of passengers are not insurers, but they are bound to the utmost care and skill in the performance of their duty. If the carrier be guilty of negligence which mediately or immediately produced the injury, and the party injured was not guilty of any negligence, carelessness, or imprudence, which directly contributed to the injury, the carrier will be liable.

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Appeal from St. Louis Court of Common Pleas.

This is an action brought, under the statute, by the plaintiff, to recover the sum of five thousand dollars, on account of the death of her husband, caused, as is alleged by the plaintiff, by the carelessness of defendant's agents in conducting certain street railroad cars belonging to the defendant. Defendant denies carelessness or negligence on the part of its agents, and avers that Charles Huelsenkamp, the deceased, came to his death by reason of his own carelessness and negligence.

It appears from the evidence, that the accident occurred in the night time, on the Franklin avenue railroad track, and at a switch or turn-out on the road; that the deceased was on the car which was coming into the city from the Fair grounds; that the car was very much crowded; that the deceased was standing on the steps of the platform of the car; and that whilst this car was passing another car of defendant, which was standing on the switch, the body of deceased was brought in contact with the said stationary car, and that he was thus crushed and killed. It was in evidence, that deceased, whilst standing on the steps of the moving car, was holding on to the iron railing of the window of the car, and that his body was swinging out some distance from the body of the car at the time, or just before, the accident occurred; that he was told by one of the witnesses that he was in a dangerous position—that he had better get farther in, or get off the car; and witness also testified that he could have avoided the danger if he had chosen to do so.

There was a conflict of testimony as to where the stationary car was standing on the switch, whether in the centre, or more to one end. There was conflict, also, as to whether the cars, in passing, would have touched each other; but the preponderance of testimony was, that they would have passed without touching. The distance between the tracks, at the centre of the switch, was three feet, two inches. There was no evidence to show that the driver knew that the deceased was on the car.

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Upon the trial, the following instruction was asked by the plaintiff, and given by the court :

"The simple fact, that Huelsenkamp was on board the defendant's car, will not authorize the jury to infer or conclude that he was a passenger for hire. But if they are satisfied from the evidence, that persons, without the previous consent of the agents or servants of the defendant, were in the habit of getting on its cars and riding thereon, both outside and inside, upon the platform and steps, and that, too, without reference to the number of persons so getting on and riding, and that the defendant habitually collected the fare for the carriage of such persons; and further, that Huelsenkamp got upon the defendant's car for the purpose of being carried as a passenger, then, in the absence of any prohibition against his becoming a passenger, the jury is justified in inferring there was a contract between the defendant and him, that the defendant would carry him as a passenger for the ordinary fare; and it is the right and the duty of the jury to determine, from all the evidence in the case, whether there was any such contract between the defendant and Huelsenkamp; in other words, to determine whether he was a passenger for hire on defendant's car, or not."

Also, the following :

1. If you find that deceased was, at the time of his death, the husband of plaintiff; and that defendant was a corporation and a common carrier; and that deceased was a passenger for hire in a car of defendant; and that deceased was carried as a passenger upon the steps of a car of defendant, by its agents, because there was no room elsewhere for him, in or about the car; and if, while the car upon which deceased was being carried, was passing another car of defendant, upon a turn-out in the road, the two cars came in collision with each other, or approached each other so near as to kill deceased by jamming him or crushing him between the said cars; and such catastrophe was caused by the least negligence, want of skill, or prudence, on the part of defendant's agents, in managing said cars, or either of them; and

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that deceased then and there exercised ordinary care and prudence as a passenger, then the jury should find for plaintiff, and assess damages at five thousand dollars. And, under the circumstances above stated, although the jury may believe that if deceased had used extraordinary care, and had been on the alert, and had been looking out ahead for danger, he might have avoided injury, yet his failure so to do furnishes no excuse for defendant, and its liability is not affected thereby.

2. If the jury find the agents of defendant were guilty of negligence in the management of the cars of defendant, by reason of which two of defendant's cars came in collision with each other, or came so near each other on the road, at a place provided for the cars on the road to pass each other, by reason of which deceased was injured and killed; and that deceased was then a passenger on defendant's road; and that deceased was not guilty of any want of ordinary care and prudence, which directly contributed to the injury, then the defendant is liable in this suit.

3. Although the deceased may have been guilty of misconduct, or failed to exercise ordinary care and prudence, while a passenger on defendant's car, which may have contributed remotely to the injury or death of deceased, yet if the agents of defendant were guilty of misconduct in the management of said cars, which was the immediate cause of deceased's injury and death; and with the exercise of prudence by said agents, said injury and death might have been prevented, the defendant is liable in this suit; and if the jury find for the plaintiff, they will assess the damages at the sum of five thousand dollars, and return a verdict for the plaintiff for that sum.

All of which said instructions, so asked by the plaintiff, and numbered 1, 2 and 3, were given by the court.

The following instructions were given for the defendant:

1. If Charles Huelsenkamp voluntarily took and placed himself in a dangerous or improper place or position on the

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car, when he might have taken a more safe place or position, and his death was caused by reason of his having placed himself in such a dangerous position, then plaintiff cannot recover.

2. If it appear that Huelsenkamp was not a passenger at the time of the injury, the defendant is only bound to the use of ordinary care, and is responsible only for gross negligence. Ordinary care is that degree of care which a prudent man would exercise about his own affairs.

3. If it appear that Huelsenkamp was not a passenger, and that he did not, in any manner, by his own negligence, contribute to the injury, still the plaintiff cannot recover, unless it appear that the injury and death were caused by the gross negligence of defendant, or its agents.

Instruction No. 1, as above, was interlined by the court, as follows, "when he might have taken a more safe place or position," and in that form it was given; to which defendant excepted.

The defendant asked the following instructions:

1. The mere fact that Huelsenkamp was being transported upon the car of defendant does not constitute him a passenger, unless it appear that he was being transported, with the knowledge and consent of defendant, or one of its agents, for a consideration, paid or to be paid, under some express or implied agreement between the parties.

4. Whether Huelsenkamp was or was not a passenger, if he by his own negligence in any way contributed to the injury, the plaintiff cannot recover.

5. Whether the deceased, Huelsenkamp, was or was not a passenger, he himself was bound to the use of ordinary care; and if the injury was the result of the common fault of both parties, the plaintiff cannot recover.

6. If it appear from the evidence, that the car standing on the switch was in such a position as that the moving car could pass it without colliding; that the horses in the moving car were going at a moderate gait; that Huelsenkamp

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had placed himself, at the time of the injury, in a dangerous or improper position on the car, and that in consequence of his occupying that position the injury occurred from which the death ensued, then the jury must find for the defendant.

7. If it appear that Huelsenkamp wilfully, and without the consent of defendant's agents, placed himself on the car in a dangerous position, from the result of which the injury and death occurred, then defendant is not liable, unless it appear to the satisfaction of the jury that defendant's agent saw that Huelsenkamp was in such a dangerous position, and wilfully and designedly contributed to the injury.

8. In this action the plaintiff cannot recover, unless it appear from the evidence, that, in case death had not ensued, Huelsenkamp himself would have had a right of action against the defendant for the damages occasioned by the injury.

9. If Charles Huelsenkamp voluntarily placed himself in a dangerous or improper place or position on the car, and the cars of defendant were so managed or conducted, that he could not have been injured in a proper place thereon, and that his death was caused by reason of his having taken such dangerous and improper position, plaintiff cannot recover.

All of which instructions, so asked by the defendant, as above, were refused by the court.

A verdict was found for the plaintiff; a motion for a new trial made by the defendant, and overruled by the court; an appeal asked and granted.

Sharp & Broadhead, for appellant

This case has once before been before the Supreme Court of Missouri—34 Mo. 45; but the main point presented was not decided. In the opinion delivered in that case by the court, it was held, that the court below had erred in undertaking to determine, by instruction, what was misconduct or negligence. It was very properly held, that this was a question peculiarly within the province of the jury; but this was the only question decided by the court.

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In the case as presented before this court, the appellant claims that the court below erred in giving the third instruction asked by the plaintiff, and in refusing all the instructions asked by the defendant upon the points involved in that instruction, particularly the fifth and sixth.

The question presented is, whether, if the deceased was in fault, and, by his own fault or want of care, contributed to the injury complained of, the plaintiff can recover. The court below says, it makes no difference, unless the act of the party directly contributed to the injury. And as to what constituted a direct or immediate cause of the injury, so far as the acts of the deceased were concerned, the court refused to give the instructions asked by the defendant.

The rule established by the court below, in these instructions, ignores the necessity of all care and prudence on the part of the plaintiff, unless it contributes directly to the injury, so that it matters not how much the person may be in fault, nor how slight the negligence may be on the part of the defendant, the defendant is nevertheless liable if an injury occurs.

In the case of *Spooner v. Brooklyn City R.R. Co.*, 31 Barb. 419, it was held, that "no action will lie against another, to recover damages for a personal injury, where it appears that the carelessness and imprudence of the plaintiff contributed to the injury"—*Chamberlain v. Milwauk. & Miss. R.R. Co.*, 7 Wis. 431; *Butterfield v. Forrester*, 11 East. 61; *Willetts v. Buff. & Roch. R.R. Co.*, 14 Barb. 585; *Penn. R.R. Co. v. Aspell*, 23 Pa. 149; *Rathbun v. Payne*, 19 Wend. 401; *Maccon & West. R.R. Co. v. Davis' adm'r*, 13 Ga. 87; *Harlow v. Huniston*, 6 Cow. 191. Negligence by the defendant, and ordinary care by the plaintiff, are necessary to sustain the action—*Brown v. Maxwell*, 6 Hill, 592; *Brand v. Troy & Schen. R.R. Co.*, 8 Barb. 368. Where negligence on both sides, neither can recover, unless one be guilty of wanton injury or gross neglect—*Hennig v. Wilm. & Balt. R.R. Co.*, 10 Ired. 404; 12 Pick. 177; *Pierce, Am. R.R. Law*, 272-8.

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If the evidence of the plaintiff shows that he contributed to the injury, he may be non-suited, without submitting the case to the jury—Pierce, Am. R.R. L. 274; Haring v. N. Y. & Erie R.R. Co., 13 Barb. 9; Sheffield v. Roch. & Syr. R.R. Co., 21 Barb. 339.

The company is not responsible for an injury to a passenger which would not have happened but for his negligence, or to which his negligence substantially contributed—Gale-na & Chicago Un. R.R. Co. v. Yarwood, 15 Ills. 468; Gal. & Chic. R.R. Co. v. Fay, 16 Ills. 558..

In none of these cases do we find any distinction drawn between injuries resulting from the direct and immediate negligence, or those resulting from remote or consequential causes of injury. The simple question is, whether the act or negligence of the plaintiff contributed in any way to the injury; if so, he is not entitled to recover. Indeed it would be impossible, in most cases, to draw that distinction so as to make it intelligible.

Cline & Jamison, for respondent.

A carrier of passengers is bound to use all care, caution, and prudence, that human foresight can bring to his aid, and is liable for the least negligence, and must use the highest degree of diligence—Phil. & Reading R.R. v. Derby, 14 How., U. S. 486; Stokes v. Saltonstall, 13 Pet. 192—see the instructions given in this case; Sto. Bail. ¶ 11; St. bt. New World v. King, 16 How., U. S. 474; Hall v. Conn. St. bt. Co., 13 Conn. 327; Fuller et ux. v. Naugatuck R.R. Co., 21 Conn. 565, 576; Camden R.R. Co. v. Burke, 13 Wend. 611, 626; McKinney v. Neil, 1 McLean, 552; Maury v. Talmage, 2 McLean, 161; Stockton v. Frey, 14 Gill. 406; Derwent v. Loomer, 21 Conn. 245, 253; Boyce v. Anderson, 2 Pet., U. S., 150; Ang. Carr. §§ 523, 568, 570; Redf. Railw. § 149, p. 323; Ingalls v. Bills, 9 Metc. 1; Harris v. Caster et al., 1 C. & P. 636; Chester v. Greggs, 2 Campb. 79; Sharp v. Grey, 9 Bingh. 457.

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The deceased was not bound to be on the alert, or to use extraordinary care, and to look out ahead, to avoid danger. All that is required of a passenger is, that he should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury; to exculpate the carrier, the passenger must have been guilty of negligence which, in whole or in part, was the proximate cause of the injury—Redf. Railw. § 150, p. 330, and cases cited; Pearce, Railw. p. 276; Carroll v. N. Y. & N. Hav. R.R. Co., 1 Duer, 580; Zemp v. W. & M. R.R. Co., 9 Richardson, 84; Penn. R.R. Co. v. McCluskey, 23 Pa. 526; Trow v. Vermont R.R. Co., 24 Vt. 487; Robinson v. Cone, 22 Vt. 213; Berge v. Gardiner, 19 Conn. 507; Lynch v. Nurdin, 1 Ad. & El., n.s. 422; Collins v. Sch. Railw., 12 Barb. 492.

Although the deceased may have been guilty of misconduct, or failed to exercise ordinary care and prudence, while a passenger on defendant's cars, which may have contributed remotely to the injury or death of deceased, yet, if the agents of defendant were guilty of misconduct in the management of said cars, which was the immediate cause of deceased's injury and death, and with the exercise of prudence by said agents said injury and death might have been prevented, the defendant is liable in this suit—Redf. Railw. § 150; Trow v. Vermont Cent. R.R., 24 Vt. 487; Zemp v. W. & Mar. R.R. Co., 9 Richd. 84; Penn. R.R. Co. v. McCluskey, 23 Pa. 526; Pearce, R.R. Law, p. 276; Bigby v. Hewit, 5 Exch. 243; see opin. of Polluck, C. B., Kerwhacker v. C. C. & C. R.R. Co., 3 Ohio, 172; C. C. & C. R.R. v. Elliott, 4 Ohio, 474.

The above authorities establish the proposition, that although the deceased may have been guilty of remote or indirect negligence, yet, if the agents of defendant were guilty of direct or proximate negligence, the plaintiff can recover; and this is the proposition asserted in the above instruction.

WAGNER, Judge, delivered the opinion of the court.

In the discussion of this case at the bar, the counsel took

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an exceedingly wide range, examining at length the doctrine applicable to the law of carriers, and also of contributory negligence. It may be conceded that the law in reference to the liabilities and responsibilities of carriers of passengers is now well understood and defined. They are not, as in the case of carriers of goods, insurers and responsible for all damages which do not fall within the excepted cases of the acts of God and the public enemy, but they are bound to the utmost care and skill in the performance of their duty. The degree of responsibility, therefore, to which carriers of passengers are subjected, is not ordinary care, which will make them liable only for ordinary neglect, but extraordinary care, which renders them liable for slight neglect. Public policy and safety require that they should be held to the greatest possible care and diligence, and that the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents—Ang. Corp. § 568; Ingalls v. Bills, 9 Met. 1; Stokes v. Saltonstall, 13 Pet. 181; Phil. & Reading R.R. Co., v. Derby, 14 How. 486; Stm. bt. New World et al., v. King, 16 How. 469. But the principal ground relied on by the appellant in resisting a recovery, is that the deceased was guilty of negligence, and contributed to the accident which resulted in his death; and that where both parties are in fault the plaintiff cannot recover. Perhaps no question has been more discussed and litigated in the courts, of late years, than this very question of what will amount to such fault or negligence as will preclude a party from maintaining an action for an injury. Where a person was injured by an obstruction placed in the highway, against which he fell, and brought his action to recover damages against the person who caused the obstruction, Lord Ellenborough said, “One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff”—Butterfield v. Forrester, 11 East. 60. In Galena & Chi-

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cago Union R.R. Co. v. Yarwood, 15 Ills. 468, a passenger was taken on the train to be transported for a short distance, and was told that the passenger cars were full, and that he must ride in the baggage car; and having entered the baggage car, he then commenced playing and scuffling with two fellow-passengers, and in the course thereof ran from the baggage car into the passenger car, and the train being thrown from the track, rushed out at the forward end of the latter car and jumped from the platform, by which his leg was broken. It was held, that it was culpable negligence in him to put himself in that position, contrary to the terms on which he was received as a passenger, which made the leap necessary to escape the peril, and that consequently he was not entitled to recover. And if a man chooses to ride on a railroad with his head and arms out of the car window, and in passing a dangerous place in the road, disregards an audible warning, by the conductor, of the danger of putting his head or limbs outside the car, and will not ride like a prudent man, he will have to bear the consequences of his foolishness. So where a lunatic was travelling in the cars upon a railroad, in company with his father, who had paid the fare for both and taken tickets; the father got out at a stopping-place to procure refreshments, leaving his son in the cars, without giving notice to any one of his situation, and while absent the train started. On regaining the cars the father did not find his son where he had left him, the latter having changed his seat. The conductor, in the absence of the father, applied to the lunatic for his ticket, not knowing him to be insane or that his fare had been paid. The lunatic refusing to deliver his ticket, the conductor caused the train to be stopped and the lunatic to be put off the cars, in consequence of which the lunatic was run over by another train of cars and killed. The evidence not showing any negligence or want of care on the part of the conductor, but showing great negligence and imprudence in the conduct of the lunatic and his father, it was held that an action could not be maintained by the personal representatives of the lunatic against

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the railroad company, under the New York statute, authorizing the recovery of damages in case of death by the wrongful act, neglect or default of another—Willets v. Buffalo & Rochester R.R. Co., 14 Barb. 585. The case of Chamberlain v. Milwaukee & Miss. R.R. Co., 7 Wis. 425, is not an authority to the extent contended for by the counsel for the appellant. There the court which tried the case instructed the jury, that the fact that the plaintiff was on the train and was injured by being thrown off and run over, would of itself constitute a *prima facie* case in which the plaintiff would have the right to recover. The court held that this instruction was erroneous, and said the accident might have happened by his own want of ordinary care and prudence, while upon the top of the cars at the brake, and under such circumstances as would exonerate the company from all blame in the premises. But that, if he could show he was exercising ordinary care and diligence, and he was injured by the carelessness and negligence of the servants of the company, he would be entitled to damages, and that he must also show that his own negligence did not contribute to the injury.

Where there is a choice of positions upon a railroad, either of which a passenger may lawfully take, he is not obliged to select that which is the least dangerous. Thus in Carroll v. N. Y. & N. Hav. R.R. Co., 1 Duer, 571, the plaintiff was injured by a collision of two trains running in opposite directions. The plaintiff was at the time of the collision in the post-office department in the baggage car, being lawfully there and with the acquiescence of the conductor. It was a much more dangerous location, on the happening of such a collision as took place, than a seat in the passenger cars, and he knew the fact, and had he been in the passenger car he would not have been injured. It was held, that negligence is the violation of the obligation which enjoins care and caution in what we do, and that the plaintiff not being under any obligation to be more prudent and careful than he was, in contemplation of there possibly being such culpable conduct on the part of the defendant as would endanger his life, if he

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remained where he was, and his personal safety on any part of the train, and not being a trespasser, was not to be precluded from his action because he might have selected a position of comparative safety. And though a passenger may have been upon the cars in violation of the rules of the railroad company, yet if it appears to the jury that these rules have been waived or revoked in his favor, he will nevertheless be entitled to his action for his injuries suffered from any want of care on the part of the company—*Grt. N.W. R.R. Co. v. Harrison*, 26 Eng. Law & Eq. 443; *Collett v. London & N.W. R.R. Co.*, 6 Eng. Law & Eq. 305. We take the correct rule to be, that to the liability of a railway company as a passenger carrier, two things are requisite: That the company shall be guilty of some negligence which mediately or immediately produced or enhanced the injury, and that passengers should not have been guilty of any carelessness and imprudence which directly contributed to the injury, since no one can recover for an injury of which his own negligence was in whole or in part the proximate cause; and although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused—*Redf. Railw.*, § 150, pp. 330-1, 2 ed.; *Robinson v. Cone*, 22 Vt. 213; *Illidge v. Goodwin*, 5 C. & P. 190; *Zemp v. W. & M. R.R. Co.*, 9 Rich. Law, 84.

The general rule of law in regard to what negligence will prevent a plaintiff from recovering was much discussed in a recent case in the English Exchequer, and the principle arrived at was substantially the same as that laid down above. It seems from the report that the plaintiff had fettered an ass so that it could not escape, and left it in the highway, and that the defendant negligently drove his horses and wagon against the ass and killed it. Lord Abinger, Ch. B., in delivering the opinion of the court, said "the defendant had not denied that the ass was lawfully in the highway, and therefore we must assume it to be lawfully there; but even were

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it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." And, Parke, B., added, "the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that if they were of the opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass on the road would not bar the plaintiff of his action. All that is perfectly correct, for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road"—Davies v. Mann, 10 Mees. & W. 545. The same doctrine is declared and enforced in the Queen's Bench—Lynch v. Nurdin, 1 Ad. & El. 29, n. s. In the very able and carefully considered case of Beers v. Housatonic R.R. Co., 19 Conn. 566, the question is critically examined and many of the authorities referred to, and the court say, that there having been negligence on the part of the defendants, it was not sufficient for them, in order to excuse themselves, to show merely that there was a want of care on the part of the plaintiff, unless it was a want of such a degree of care as it was incumbent on the plaintiff to exercise. In other words, if the plaintiff exercised all the care that the law required of him, the defendants cannot deliver themselves from the effects of negligence on their part. Otherwise the plaintiff would be left without redress for an injury wrongfully inflicted on him by the defendants, when the former had been guilty of no want of duty.

The rational rule, and the one, as we think, established by

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the best authorities, in reference to the care incumbent on the plaintiff, is, that it must be ordinary care, as it is termed, which, as stated by Lord Denman, in interpreting that phrase as used by Lord Ellenborough, means "that degree of care which may reasonably be expected from a person in the plaintiff's situation," and is synonymous with reasonable care. It would seem that the principle, that one who had himself used reasonable care, but had, notwithstanding, suffered an injury from the negligence of another, should have redress for that injury, is so obviously just that it carries with it its own vindication. But it does not rest on its own inherent reasonableness. The authorities in support of it are numerous and explicit, and although it has been supposed that the cases go so far as to decide, that the want of any degree of care whatever, however great, on the part of the plaintiff, concurring with the negligence of the defendant, will preclude a recovery by the former, we are satisfied, after a careful examination of all the cases, that no well considered case, perfectly understood, sustains that position without scrutinizing in detail the cases which are deemed to favor this doctrine. It will be apparent, on an examination of them, that this erroneous impression has arisen from a want of precision in some of them, in the manner of laying down the rule which was deemed applicable to them by the judges, and from an incorrect apprehension of their language in others. It will be found, in looking at the circumstances of these cases, that the fault or negligence of the plaintiff, to which the judges alluded, as being that which would preclude a recovery, if it concurred with the negligence of the defendant, consisted not of the least degree of negligence, but of such a degree as would amount to the want of ordinary or reasonable care, and that although it was not characterized by those terms, it was obviously the degree of negligence or fault which was intended. And in several of them the right of the plaintiff to recover is expressly placed on the question, whether he exercised a reasonable care to avoid the consequences of the defendant's negligence. In further

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support of the rule heretofore laid down, we refer to the case of *Trow v. The Vermont Central R.R. Co.*, 24 Vt. 487, where the question is examined and the principle sustained. The court remarks, "this leads our investigation to the question, whether an action can be sustained when the negligence of the plaintiff and the defendant have mutually co-operated in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities. Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason 'that, as there can be no apportionment of damages, there can be no recovery.' So where the negligence of the plaintiff is proximate, and that of the defendant remote or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill v. Warren*, 2 Stark. 377; 7 Met. 274; 12 Met. 415; 5 Hill, 282; 6 Hill, 592; *Williams v. Holland*, 6 C. & P. 23. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." And the same rule is established and maintained in Georgia. In an action for killing a slave, the defence was that the slave's negligence contributed to the injury, but the Supreme Court, per Lumpkin, J., say, "it is

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insisted that, if the injury in this case resulted in whole or in part from the misconduct of the plaintiff's servant, that he cannot recover ; and this seems to have been the rule laid down in *Butterfield v. Forrester*, 11 East. 60, and *Luxford v. Large*, 5 Car. & Pay. 421. But this doctrine has been modified in later cases, and in *Lynch v. Nurdin*, 1 Ad. & El. n. s. 29, it was held that the defendant was liable in an action on the case, though the plaintiff was a trespasser and contributed to the mischief by his own act. And this case has been followed in *Robinson v. Cone*, 22 Vt. 213, and *Birge v. Goodwin*, 19 Conn. 507, and numerous other adjudications in this country. We approve of this modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented a collision"—*Macon & W. R.R. Co. v. Davis' adm'r, &c.*, 18 Ga. 679.

Now, in the case under consideration, the evidence shows that the railway company were in the habit of carrying passengers on the platforms of its cars, and collecting fare for the same. The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited ; and the evidence further shows, that owing to the crowded state of the cars, there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employees to have put him off the car ; but not having done so, they were bound to carry him with skill, prudence and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might, in all probability, have avoided the catastrophe by being on the alert and exercising extraordinary vigilance, but such was not required of him. He stood within a few feet of the driver, and the driver knew, or at least it was his duty to know, the close proximity of the cars when they were about to collide, and also the position of the passengers on the platform. His driving steadily ahead, under such circumstances, stamps the act with recklessness and

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gross negligence. The question of negligence was for the jury, and was properly submitted to them under instructions which fairly and correctly presented the true issue in the case and the law arising thereon. The instructions given by the court for the respondent and the appellant, when taken together, are unobjectionable, and properly apply the law to the case. It was not error in refusing the additional instructions asked for by the appellant, as the whole matter had been already fairly presented.

Judgment affirmed. Judge Holmes concurs; Judge Lovelace absent.

LOUIS C. GARNIER, Appellant, *v.* THE CITY OF ST. LOUIS,
Respondent.

Municipal Corporations—Contract.—By an act of the General Assembly, commissioners were named and appointed to sign warrants to be issued by the City of St. Louis in payment of debts due by the city. *Held*, that there was no contract between the city and the commissioners that the city should pay them for their services, and that they could not recover.

Appeal from St. Louis Court of Common Pleas.

Cline & Jamison, for appellant.

Clover, for respondent.

There was no contract, express or implied, to pay for any services rendered, or any evidence to make a contract.

Looking at the whole scope of the two acts, "An act for the relief of the City of St. Louis," approved May 13, 1861, and "An act to amend an act, entitled 'An act for the relief of the City of St. Louis, approved May 13, 1861,'" approved March 23, 1863, it is very apparent it was not the design or the intention of the Legislature that the commissioners named in the first recited act should receive any compensation for any service they might perform under said act.

HOLMES, Judge, delivered the opinion of the court.

This is a suit for compensation, as upon a *quantum meruit*,

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for services done as one of the commissioners appointed by the act of the General Assembly, approved May 13, 1861, entitled "An act for the relief of the City of St. Louis," and alleged to have been rendered at the instance and request of the defendant.

Evidence was offered to show that the services were rendered, that they were worth what was charged, and that defendant received the benefit of them ; and that there was some correspondence between them and certain city officers on the subject. No contract was alleged, but the plaintiff claims that there was an implied assumpsit, arising out of the facts and circumstances, that the defendant would pay for such services what they were reasonably worth. The court instructed the jury that the plaintiff was not entitled to recover on the case made. Some exceptions were taken to the exclusion of testimony offered by the plaintiff.

The whole case may be determined on a single point. These commissioners were appointed by the Legislature on behalf of the State, to sign and issue to the city treasurer certain city treasury warrants, to be issued and circulated as money. The city charter was so amended as to authorize the city corporation to pay out and circulate a given amount of these warrants, if it should be deemed advisable by the city authorities ; and these commissioners were appointed by the State to sign the warrants to be issued, and deliver them to the city treasurer for the purpose of being so used as a currency, and they were to receive them back from the treasurer, when redeemed, for final cancellation. It is plain the commissioners were State officers only, and not officers or agents of the corporation at all. Their warrants were to be circulated as money, and the State, in the exercise of its regulating control over the circulating medium, saw fit to appoint officers of its own, to regulate the issue of such money, and to see to the cancellation of the warrants when redeemed. They undertook a public function on behalf of the State, and to the State only can they look for compensation. Whether it were an honorary office merely,

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or one that should be entitled to salary, need not be considered here. It is clear they were not acting as the officers or agents of the city corporation, nor in any manner entitled to compensation from the city. Their duties were not performed at the instance and request of the city, but were to be performed, if done at all, even against the will of the corporation, and as the servants of the State. Such being their relation to the corporation, the mere fact that the services were rendered and were worth so much, or that the warrants signed were accepted and used by the city authorities, or that the city officers corresponded or consulted with them about the issue of such warrants, could have no proper tendency to prove that the services were done by them as the agents and servants of the corporation, and at their instance and request.

We think the evidence objected to was properly excluded, and that the jury was correctly instructed that the plaintiff was not entitled to recover.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

ANDREW A. LE BEAU, Appellant, *v.* DOMINIQUE GAVEN,
GALLIS FAHRMANN AND JOHN BUCHIED, Respondents.

Lands—Confirmations.—A confirmation of a lot by the Board of Commissioners in 1811, is a better title than a confirmation by the act of Congress of June 18, 1812, § 1, by virtue of inhabitation, cultivation and possession prior to December 20, 1808, as all prior confirmations were expressly excepted by said act of June 18, 1812.

Appeal from the St. Louis Land Court.

Morehead, for appellant.

T. T. Gantt, for respondents.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff claimed title under the act of Congress of the 13th of June, 1812. He endeavored to prove a possession

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of the land in controversy by John B. Petit, prior to the 20th day of December, 1803. He put in evidence a concession to one Amoit, dated September 7, 1780, of a lot bounded north by Cotté, south by Little river, and on the one end by the public road leading to the bridge over Little river, and on the other end by the King's domain, or the shore of the Mississippi, and containing 120 feet in width by 150 feet in depth; also a deed from Amoit to Petit, dated September 12, 1780, by the same description, and a derivative title downward, by a similar description, until 1825. In 1835 this lot was marked on Brown's plat of surveys of block No. 46 of the city of St. Louis, with the dimensions called for in the concession and deeds, but not going to the Mississippi river on the eastern boundary, and thereafterwards the several conveyances down to the plaintiff describe the lot with those exact dimensions, and as bounded on the east by owners unknown, or by parts of the same block. There was never any approved and recorded public survey of this lot. The plaintiff further read the deposition of a witness as tending to prove a possession by Petit prior to 1803, of the land in controversy here, fronting westwardly on Second street, and running back eastwardly several hundred feet to the Mississippi river, including all the accretions made since the date of the concession.

The defendants claimed title under a confirmation by the Board of Commissioners under the act of Congress of March 3, 1807, dated December 6, 1811, to the legal representatives of John B. Provenchere, on the ground of ten years' consecutive possession prior to the 20th of December, 1803; the land to be surveyed conformably to the possession, and it was officially surveyed in 1835, and the survey was finally approved and recorded on the 13th of June, 1845. The original concession, the confirmation, and the survey, distinctly call for the bank of the Mississippi river as the eastern boundary of the land granted and confirmed. The defendant also gave evidence tending to prove a continuous possession of the land from 1805, under this claim of title, down to the

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present time. No patent appears to have been issued. As to whether or not the calls and descriptions contained in the concession and deeds, under which the plaintiff claims, were such as to give a title to the accretions as made on that lot, or whether the testimony offered by the plaintiff amounted to any proof of an actual possession of this identical land by John B. Petit, prior to 1803, with whatever definite extent and boundary, it will be unnecessary here to decide. That the calls and descriptions contained in the defendant's title papers, from the original concession to the final survey, called for the bank of the Mississippi river as the eastern boundary, in such manner as to carry all the accretions made thereon since the origin of the title, there is not the least room for doubt. The confirmation by the Board of Commissioners in 1811 was prior in time to any there could be under the act of the 13th June, 1812. It did not vest the legal title in the claimant by its own direct force, though it was a final decision in their favor, but the decision and report were conclusive evidence of the equitable right—*Burgess v. Gray*, 16 How., U. S. 48. A survey was still necessary to designate the precise tract of land confirmed, and a patent would be required to convey the legal title. The Commissioners had full power to judge the existence of good titles to land held under French and Spanish possessors, and their decisions were to be final against the United States when in favor of the claimant. There was an equitable title, then, with a right to have a survey made and a patent issued for a tract of land confirmed, and to be more exactly defined by the survey—2 U. S. Stat. 440, § 4; *West v. Cochran*, 17 How., U. S. 403. Whether this title would be sufficient to support an action of ejectment, or not, it was clearly a confirmation by the Board of Commissioners so far as they had power to confirm, and this is enough to bring the case within the express exception of the act of June 13, 1812, in these words, "provided, that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by

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the Board of Commissioners for adjusting and settling claims to land in said territory"—2 U. S. Stat. 750, § 1. It would seem to be very plain, that Congress did not intend by this act to interfere with claims which had already been presented, investigated and finally confirmed. These claims were to be proceeded with until the final evidences of title should be completed in conformity with the provisions of the former act. This being so, a complete defence was established to any title which the plaintiff could claim under the first section of the act of the 13th June, 1812, either to the land or to the accretions.

As this point effectually disposes of the whole case, it will be useless to examine the instructions in detail. We have found no such error in the rulings of the court below as to require a reversal.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

WILLIAM BOARDMAN, Respondent, *v.* BERNARDINO FLOREZ,
Appellant.

Equity—Trustee—Agent.—A. being indebted to B. by note, as security for its payment transferred to B. a note of C.'s for a larger amount, secured by a deed of trust upon land, and the deed of trust itself. The note of C. not being paid, B. had the land sold by the trustee, and purchased at the trustee's sale. This land B. subsequently sold for an amount more than sufficient to pay the note of A. *Held*, that, in collecting the collateral note, B. was acting as the agent of A., and was subject to all rights and disabilities incident to that character, and could not, under the circumstances, speculate for his private gain, to the prejudice of his principal.

Appeal from St. Louis Court of Common Pleas.

Sharp & Broadhead, for appellant.

T. G. Davis, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an application for an injunction. It appears upon the record that respondent made his negotiable prom-

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issory note, endorsed by one Evans, payable to appellant, for the sum of twelve hundred and twenty-four dollars, due one year after date ; at the same time he delivered to appellant, as collateral security, a negotiable note made by one Edward Bicknor, payable to respondent, for the sum of fifteen hundred dollars, secured by a deed of trust on certain real estate in Macoupin county, Illinois, and delivered to him the deed of trust also. After the maturity of the note, without giving any notice to respondent, the appellant procured the land to be sold under the deed of trust, and became the purchaser thereof at the sale, for the sum of five hundred and seven dollars. Afterwards, he re-sold the land for fifteen hundred dollars. Bicknor, the grantor in the deed of trust, was insolvent, and possessed no other property out of which to obtain satisfaction on the fifteen hundred dollar note. The appellant then brought suit against the respondent on the note made and executed to him for \$1,224, and claimed judgment for the residue, after deducting, as a credit, the five hundred and seven dollars realized from the sale under the deed of trust. The respondent then filed his bill to restrain and enjoin the appellant from the further prosecution of his suit, claiming that he was entitled to the benefit of the amount for which the land was re-sold ; that the note was thereby satisfied, and that there was a balance coming to him. The court, after hearing the cause, found for the respondent, and rendered a perpetual injunction against the appellant and his attorneys, prohibiting them from further prosecuting the action.

We find it unnecessary to examine the principles of law which govern in cases of pledges of personal property, or the rights, liabilities and responsibilities which exist between pledgor and pledgee. The counsel have argued the case solely on the hypothesis, that the delivering the note with the deed of trust, as security, was a simple pledge ; but, in our opinion, the merits and the law of the case stand on entirely different, and more satisfactory grounds. In construing a contract, or transaction, resort is had to a variety of legal

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rules to aid in its proper interpretation; but all rules are subordinate and secondary to that primary rule which requires that the construction should be according to the real intention of the parties. This rule is paramount, and all others which are merely auxiliary must yield to it. The object of the respondent in delivering to appellant the fifteen hundred dollar note, was not only to make him secure, but, by delivering the deed of trust, he also evinced his intention of giving him the means of enforcing its collection, and applying its proceeds to the discharge of the note due by him to appellant. The appellant, when he proceeded to collect the note, and, in furtherance of that purpose, caused the land to be sold at trustee's sale, placed himself in the attitude of an agent or attorney for collection, and was subject to all the rights and disabilities incident to that character. He stood on the footing of a trustee, bound faithfully to carry out the objects of the trust, and could not, under any circumstances, speculate for his own private gain, to the prejudice of his principal. No rule is better established than that an agent or trustee will not be allowed, while transacting the business of his principal or *cestui que trust*, to derive a private benefit, to the injury of the person for whom he acts—2 Sto. Eq. Jur. § 1211-1211 *a*.

Chancellor Walworth says that it is a rule of equity of universal application, that no person can be permitted to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser—Terry v. Bk. of Orleans, 9 Paige, 663; Van Epps v. Van Epps, 9 Paige, 237-41. And the rule is not applied alone to any particular class of persons, such as guardians, trustees, solicitors, attorneys and agents, but is of universal application to all persons who come within the principle. It is general, and will apply not merely in those cases where the trust or confidence is absolutely violated, but where the circumstances are such that there would or might be a temptation to violate it—Moore v. Moore, 4 Sandf. Ch. 37; 1 Seld. 256. The Supreme Court of the United States has said, the disa-

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bility is a consequence of that relation which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interferences—*Michaud v. Girod*, 4 How., U. S. 252. “The wise policy of the law has therefore put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation”—*Davon v. Fanning*, 2 Johns. Ch. 270; *Will. Eq. Jur.* 605.

In the great case of *Fox v. Mackreth*, Ld. Chan. Thurlow said, “if a trustee, though strictly honest, buys an estate himself and then sells it for more; according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he should not be permitted to sell to himself, but should remain a trustee to all intents and purposes.” And in that case, having sold the property at a highly advanced price, he was decreed a trustee, as to the sums produced by the second sale, for the original vendor—2 Bro. C. C. 400; S. C. 2 Cox, 320; *Hall v. Hallett*, 1 Cox, 134; *ex parte Reynolds*, 5 Ves. 707.

Now, by the application of these rules to the present case, the conclusion follows as a necessary corollary. The respondent delivered to the appellant a promissory note to secure an indebtedness which the former owed to the latter, but, to enable him to make that security effective, and also to liquidate and pay off the indebtedness, he delivered to him the deed of trust. The appellant, for the purpose of collecting his debt, without notifying the respondent, gets the trustee to advertise and sell the property, and becomes the purchaser at about one-fourth of its true value. He then sells the same property for the sum of fifteen hundred dollars, more than sufficient to discharge respondent's indebtedness to him, and then comes into court and asks for judgment for the amount of his demand, after crediting it with five hundred and seven dollars, being the purchase money at which he bid in the land at the trustee's sale. This is directly violative of the trust and confidence reposed in him by the respondent. Neither

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morality nor equity, which regards and enforces straightforward, honest dealing, will permit or endure such a proceeding.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

JOHN B. TILFORD, Appellant, *v.* CHARLES G. RAMSEY, Respondent.

Partnership.—A note given in the firm name with consent of all the partners, for the debt of one of the partners, is a partnership debt, and the firm is liable to the holder as principal debtor, and such note can be renewed by any of the partners.

Appeal from St. Louis Court of Common Pleas.

Hitchcock, for appellant.

I. That the note first given was in every sense a partnership debt will not be disputed. It was not a joint debt of the two partners, but a debt of the firm as such. The holder of that note was entitled to all the rights of a creditor of the firm not only as against the two partners individually, but as against the partnership assets *eo nomine*. The note being made in the name of the firm, by one partner, at the express request of the other, and with full consent to the proposed application of the proceeds, the lender also expressly requiring and taking the promise not of either partner, nor of both partners, but of the firm as such, it cannot be distinguished from any other debt contracted by the firm, no matter how strictly for the purposes of its legitimate business—*Finley v. Lynn*, 6 Cranch, 238; *Rogers v. Bachelor, and Livingston v. Roosevelt*, 1 Am. L. C. 406–53; *Hickman v. Kunkle*, 27 Mo. 401, 403; *Cayton v. Hardy*, id. 536; also, 10 Wend. 461; 2 Bailey, 109; 3 Conn. 194, 198; 8 Greenl. 417, 420; 15 Pick. 276, 290; 6 Vt. 257; 12 Pick. 430, 436; 9 Ala. 313.

II. This being so, the question as to the second note stands precisely as if it had been given in renewal of any other

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debt of the firm contracted in the course and for the purposes of its legitimate business, and with the knowledge and consent of both partners. There can be no doubt whatever that Mitchell had authority to renew this first note in the firm name, and thereby bind the firm—See 3 Kent. Com. 10 ed. p. 45, (41 * in margin); Sto. on Part. §§ 101-3; Sto. Agency, § 124; Collyer on Part. § 195; Hickman v. Kunkle, 27 Mo. 403; Cargill v. Corby, 15 Mo. 425; see also 7 Dana, 367; 4 Shepley, 416; 18 Wend. 466; 10 Mass. 476; 12 id. 54; 15 id. 75, 331; 5 Pet. 529; 2 Pet. 198; Kirby, 77; 1 A. K. Marsh, 181; Har. & Johns. 28.

Gray, for respondent.

I. Knowledge of Bodley, plaintiff's agent, that Mitchell got the money for his own private use, was notice of that fact to plaintiff—Sto. Ag. § 140; Hill on Trus. 165.

II. The note was not made in the firm name and was therefore not binding on the firm—1 Pars. Notes, &c., 135, & note r.; 9 Mees. & Welby, 284; 11 Ad. & El. 339. The firm name was Charles G. Ramsey & Co. The note declared on is executed in the name of Chas. G. Ramsey & Co. To bind the firm a note must be in the firm name; this is not. The power of a partner to draw bills, notes, &c., is only implied, and may be rebutted, and if a third party have notice of want of authority, he cannot recover—15 Mo. 425; Hickman v. Kunkle, 27 Mo. 401, 536; Colly. Part. § 483; 3 J. J. Marsh. 527; 7 Mon. 798.

HOLMES, Judge, delivered the opinion of the court.

The note sued on was given by one partner, who signed the name of the firm thereto as makers. It was endorsed for accommodation to the plaintiff by the payee. It was drawn and given in renewal of another like note, which had been executed to the plaintiff, and signed by the name of the firm by the other partner, for a loan of money which was received by the first partner for his own individual use, unconnected with the partnership business. It appears that the

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plaintiff's agent was unwilling to make the loan directly to the individual partner, and to receive the signature of the firm merely as security on the note; and he required that the note should be given as a partnership note, and signed by the other partner himself. He was willing to make the loan to the firm, but not to the individual partner. It was understood by all the parties that the money was borrowed for the benefit of the individual partner ; but the lender would not loan it otherwise than upon the name and credit of the firm. In such case, the loan is to be considered as made to the firm, and not to the individual partner. That the firm allowed the money to go to the individual partner for his own private use was a matter that lay wholly between the partners themselves, and did not concern the lender. It is laid down by Chancellor Kent, that if a note be given by one partner in his own name for money which is to be applied to partnership uses, he alone, and not the firm, will be bound to the lender—3 Kent's Com. 41. The borrowing partner, and not the lender, is then the creditor of the firm. So here, the borrowing firm, and not the lender, became the creditor of the individual partner. That the note given in the name of the firm, though in a matter which is not in its nature a partnership transaction, and not within the general scope of the partnership business, will bind the firm when it is done with the express assent, or under the implied sanction, of all the partners, there can be no possible doubt—3 Kent's Com. 42 ; Dob. v. Halsey, 16 J. R. 34 ; Ridley v. Taylor, 13 East, 175 ; Hickman v. Kunkle, 27 Mo. 401. Where the note is given with the express assent of all the parties, and with the understanding that the loan is made on the credit of the firm, it becomes a partnership debt as fully as if the money were to be applied to the business of the partnership. This note, then, was given for a debt of the firm itself.

When the note became due, it was renewed by the individual partner, signing the name of the firm, without again consulting the other partner. There was some evidence tending to show that this other partner (who had signed the

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first note) had charge of the financial part of the business, and usually drew the notes and checks of the firm, though not always; but there was no proof of any positive restriction, by stipulation or agreement between the partners, upon the power of either partner to sign the notes in the name of the firm; nor that any such restriction was known to the plaintiff. The fact that one partner usually signed the notes and drew the checks of the firm, if it had been known to the plaintiff, would not have been enough to show a restriction upon the general authority of the other as a partner; and the circumstance that the original note had actually been signed by the other partner, with a full knowledge of the nature of the transaction, might fairly be taken by him as negativing any presumption that could arise from a knowledge of such general practice merely. The evidence, on the whole, tended to negative the existence of any restriction on the general authority of either partner. The whole case is thus reduced to the simple question, whether this partner had authority, as a partner, to renew the note of the firm, which had been given for a partnership debt. As the note was not paid when due, it may be presumed that the firm had not the funds ready to pay it, and that a renewal would be for the advantage of the firm. That each partner has power, unless restricted by some stipulation, to transact the whole business of the firm, is a well settled doctrine of the law of partnership—*Sto. Part. § 101-2, & notes; Winship v. Bk. of U. S., 5 Pet. 529.* It was not denied that it came within the scope of the general authority of this partner to give notes in the name of the firm in the usual course of partnership business. The original note had been made, by the act of the parties, a partnership transaction, as much as if it had been given in the immediate business of the firm; and either partner had the same authority to renew it that he had to give a new note for any debt of the firm.

Now, if the loan had been made to the individual partner on his own credit, or to any third person, and the name of the firm had been signed as an accommodation endorsement,

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or as a security only, there would have been good ground to say that neither partner could have renewed it without the knowledge and assent of the other. He might not be willing to extend the liability of his firm in a transaction not within the scope of the partnership business, beyond that created by the signature already given. It does not come within the authority of a partner to sign the name of the firm in such a transaction, and, in such case, the authority must be proved by further evidence. It may sometimes be inferred from a previous habit and course of dealing. The matter seems to have been viewed in this light in the court below. But, as we conceive, the case is materially different where the firm itself is to be considered as the original debtor. The firm was bound to pay the first note, not as sureties merely, but as principals. If this partner had paid that note out of the funds of the firm, there could have been no doubt of his authority to do so. The giving of a new note in renewal was, in such a case, but another mode of payment; and the time gained must be deemed to have been for the advantage of the firm, rather than for the private use and benefit of the individual partner.

Another point raised was, that the renewed note was signed "*Chas. G. Ramsey & Co.*," when the name of the firm was "*Charles G. Ramsey & Co.*" The court below seems to have treated this point as a matter of fact for the jury on the evidence as to its substantial identity; and in this respect we see no error in the instruction that was given on the subject. A partner has a general authority to bind the firm in the name of the partnership only, and his power to bind the firm by signing any other name is not to be implied from the mere existence of a partnership doing business under a name and style different from that which is signed, but must be proved by other evidence.

The question whether there is any substantial difference between the given signature and the name of the firm, may be left to the jury—*Kirk v. Burton*, 9 Mees. & Wels. 284; *Kinsman v. Dallam*, 5 Mon. 382. The difference here was

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not material ; it was a common abbreviation only ; and a jury could be well warranted in finding that the name and the signature was the same.

There were several instructions, given or refused, on either side ; but they all seem to have turned upon the points above discussed, and it is not deemed necessary to review them particularly. On a new trial, the instructions can be settled in conformity with this opinion.

Judgment reversed and the cause remanded. Judge Wagner concurs ; Judge Lovelace absent.

JUSTIN F. WESTON, Respondent, *v.* WILLIAM CLARK, Appellant.

1. *Execution—Lands.*—A judgment creditor purchasing the land of the execution debtor upon a sale made under execution issued upon a judgment satisfied, takes no title. The sale upon a satisfied judgment is absolutely void as to purchasers with notice.
2. *Practice—Evidence.*—The order in which evidence shall be introduced and admitted upon the trial rests in the sound discretion of the court.
3. *Judgment—Satisfaction.*—A judgment against several debtors, entered satisfied so as to discharge the lien as to one of the defendants, is satisfied as to all.

Appeal from St. Louis Land Court.

Krum, Decker & Krum, for appellant.

I. The plaintiff having given in evidence the judgment and execution in the case of James A. Monks *v.* Isaac T. Green and Franklin Weston, and also the sheriff's deed dated February 8, 1860, to the defendant, it was not competent for the plaintiff to give evidence tending to prove that said judgment had been satisfied before the sheriff's sale of the property in question to the defendant. The evidence shows that Weston paid some money, and gave his, or rather the note of Weston & Son, to defendant ; but it does not appear that the defendant agreed to accept said note in satisfaction of said judgment—Appleton *v.* Kennon, 19 Mo. 637.

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II. The abstract book of judgments, required to be kept by the clerk of the Land Court, is not a record. He simply makes entries of abstracts sent to him by the different clerks of other courts of record—§ 13, Land Ct. Act, R. C. 1855, p. 1594; Sess. Acts 1860-1, p. 510. The mode of entering satisfaction of a judgment is provided by statute—R. C. 1855, pp. 905-6, §§ 21, 23, 24. Nothing will amount to the satisfaction of a judgment but an order entered in the court in which it was rendered, or an entry on the margin of the record, witnessed by the clerk.

T. T. Gantt, for respondent.

The paper executed by the sheriff has no validity unless it be made in execution of a statutory power. The evidence of a judgment by a court of competent jurisdiction, still subsisting and unsatisfied, lies at the foundation of this power. If the debt has been paid, if the judgment has been satisfied, he has no pretence of power to sell. In the case at bar, the party issuing the writ, purchasing at the sheriff's sale, and taking the deed to himself, was the same person who had declared of record on the 24th of September, 1859, that the judgment had been satisfied in full—Austin's heirs v. Reed, 9 Mo. 713; Jackson v. Anderson, 4 Wend. 474.

HOLMES, Judge, delivered the opinion of the court.

Both parties claim title under the same person, from whom the possession is admitted to have been derived.

The plaintiff claims under a sheriff's sale and deed under an older judgment, the lien of which had expired, by virtue of an execution levied within five years from the date of the judgment. The defendant claims by virtue of a prior sheriff's sale and deed, under an execution issued upon a junior judgment, which was a lien unless the same had been extinguished by satisfaction prior to the issuing of the execution. The plaintiff put in evidence his own title papers, and also the judgment, assignment thereof, execution and sheriff's deed, under which the defendant claimed; and then, for

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the purpose of proving satisfaction of this junior judgment, prior to the issuing of the execution thereon, showed a receipt of the assignee and owner of the judgment as follows: "Received, St. Louis, Mo., Sept. 24, 1859, of F. Weston & Son, three hundred and fifty dollars in cash, and a note payable sixty days after the above date, for the sum of three hundred and thirty-five dollars and forty cents, being for a judgment assigned to me by Mr. Monks, for the amount of six hundred and forty-four dollars and fifty cents;" and also an extract from the abstract of judgments kept by the clerk of the St. Louis Land Court, showing an entry of the same date as the receipt in the blank column ruled for such entries, and opposite the name of one of the two defendants therein, in these words: "As assignee of this judgment, I acknowledge full satisfaction of the same," written by the clerk and signed by the assignee. A witness proved that the assignee signed the receipt, and then went with him to the clerk's office and there executed the above acknowledgment of satisfaction; that the judgment debtor who made the payment, being merely surety for the other, wishing to sell land of his own, and finding the lien of this judgment in his way, paid the amount, and caused the entry of satisfaction to be made for the consideration named in the receipt; and that the amount of the note when due had been tendered to the defendant, who refused to receive it. He also proved that the defendant entered into possession of the land sued for, after the date of his deed from the sheriff, and had continued in possession ever since. The defendant objected to all this proof of payment, on the ground that the plaintiff had no right to invalidate thus the sheriff's deed to the defendant, after having himself given it in evidence. He also gave some testimony tending to show, that the defendant, in receiving payment and acknowledging satisfaction, intended to release the party only who made the payment, and not the other.

The material questions presented by the instructions, are, first, whether this evidence of payment should have been excluded when offered; and, second, if not, whether it amount-

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ed to such proof of satisfaction as to extinguish the judgment and render all the subsequent proceedings void.

As to the first question, we do not see any ground on which the objection can rest. There was perhaps no necessity that the plaintiff should have introduced these documents at that time, but there was no impropriety in his doing so, for the purpose of showing by virtue of what claim of title or right the defendant had entered into possession, or how he had been put in possession, and that his possession was derived from the common ancestor and under his sheriff's deed. The judgment was admissible, to show the character of the possession—1 Greenl. Ev. § 539. The plaintiff stood on his prior right of possession, and it was proper for him to show that the defendant had acquired the actual possession by means of a void deed and a fraudulent pretence of right, and was in fact an intruder upon him. It was as relevant and admissible as the evidence of payment, and the order of introducing the evidence was subject to the discretion of the court. More regularly, perhaps, it might have come in by way of rebuttal, but we see no substantial objection to its admission as a part of the plaintiff's case. It is not objected to on this ground. But it is insisted that it was an attempt on the part of the plaintiff to invalidate his own evidence, or to attack the validity of the proceedings collaterally. Their validity, as such, is neither invalidated nor attacked. It is not by reason of any error, irregularity or defect in the records and documents, in themselves, that they were sought to be avoided ; but the purpose and effect of the evidence was to show that a judgment, once regular and valid, had been paid and extinguished, and that the defendant had made a fraudulent use of the execution and proceedings thereon, regular enough on their face, but nullities in law and fact. It is not the case of calling in question the regularity and validity of judicial proceedings in a collateral suit. It is more like an attempt to contradict the party's own witness. But even in such case, the rule only precludes an impeachment of the veracity and credibility of the witness, but does

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not exclude other competent testimony to prove the truth of any particular fact, in direct contradiction to what the witness may have said—1 Greenl. Ev. §§ 442-3. There is no inherent contradiction in proving the existence of a valid judgment, and its subsequent extinguishment by satisfaction.

As to payment, the evidence clearly shows that the parties intended such a satisfaction of the judgment as would extinguish the lien. For this purpose payment in cash and a note, to the full amount, was accepted by the owner of the judgment, and the receipt given expressly said it was for the judgment. The very object the party had in view in making this payment was to remove the lien, so that he could sell his own land. It did not matter whether the note was paid or not when due. Being received for the amount of the judgment, and accepted in full satisfaction thereof and for the very purpose of removing the lien, it amounted to absolute payment. The judgment was thereby satisfied and extinguished, even without satisfaction being entered of record in the court in which it was rendered—*Witherby v. Mann*, 11 J. R. 518. The parties did not stop here. They went directly to the clerk's office of the Land Court, and an acknowledgment of full satisfaction was there entered in the abstract of judgments. The entry was written by the clerk, in the column ruled for such entries, and signed by the owner of the judgment. The statute provides, that this abstract of judgments shall be kept by the clerk of the Land Court, and that no judgment of any court in St. Louis county shall be a lien on real estate until an abstract of such judgment shall be entered in that book; and it is to be ruled in columns, to show the names of the parties, the court in which the judgment was rendered, the date thereof and of its entry in said book; and it is also to have "a vacant column in which to state the satisfaction, or other disposition of said judgment." Liens are to have priority according to the period of their respective entries therein. This book is a record of the Land Court. The clerk is to keep it, and he has power to make these entries in it. The act requires that there shall be a column in which satisfac-

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tion of the judgment may be stated, when made—R. C. 1855, p. 1594, §§ 13, 14. It is evidently intended that the clerk shall have power to enter this statement of satisfaction as well as to enter the judgment. The entry of the judgment makes it a lien ; the entry of the satisfaction must discharge the lien. There is as much power to loose as to bind. We see no reason why the clerk should not have this power. When the judgment is to be entered satisfied in the court in which it was rendered, the clerk has power to make the entry in vacation. This judgment was not entered satisfied in the court from which it came. How that might have affected the rights of parties without notice, or whether the entry of satisfaction in this abstract of the Land Court alone would be sufficient to impart notice to all persons, we are not now called upon to decide. Here there is no question of notice, nor of the rights of innocent parties. The defendant was an actor here, and knew all the facts. Both parties went to the clerk's office together, and made a formal entry and acknowledgment of full satisfaction. This proceeding amounted to an estoppel *in pais*, if not also by matter of record. The fact is neither denied nor contradicted. That the parties may have thought only of removing the lien upon the property of Weston, and not as against the other judgment debtor, is nothing to the purpose. They intended to make satisfaction and discharge the lien, and that could not be done without discharging both debtors. The judgment was necessarily extinguished as to both.

It has been a question whether a sale under a satisfied judgment was wholly void, or only voidable ; but it seems to be conceded that it is an absolute nullity against a purchaser with notice of the fact, and in bad faith—Reed v. Austin, 9 Mo. 713 ; Jackson v. Anderson, 4 Wend. 474. Whatever may have been the intent of the defendant here, his acts and proceedings were such as to work a positive fraud. Having received absolute payment of his judgment, he should have known that he had no right to receive another satisfaction from anybody else. He refuses the money on the note ac-

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cepted in part payment when it is tendered to him, and he is now seeking to hold the property of the other debtor, which he has caused to be sold under a judgment which he had solemnly acknowledged to be paid, satisfied and extinguished. He cannot be allowed thus to receive full satisfaction with the right hand from one joint debtor, and then stretch out the left in this manner to grasp the lands of the other for the same debt. It is a gross and palpable fraud. We are of the opinion that the execution sale and sheriff's deed to the defendant were absolutely null and void.

Judgment affirmed. Judge Wagner concurs; Judge Love-ace absent.

WILLIAM HAHN *et als.*, Appellants, *v.* CLEMENT DIERKES *et al.*, Respondents.

Time—Mechanics' Liens.—A sub-contractor's notice of lien given on the 15th February, and a lien filed on the 25th February, is given ten days before the filing of the lien, as required by the statute. The first day must be excluded, and the last included, in computing time within which an act is to be done—R. C. 1855, p. 1027, § 22.

Appeal from St. Louis Land Court.

Spies & Gray, for appellants.

Taussig, for respondents.

WAGNER, Judge, delivered the opinion of the court.

There is but one single question presented for consideration in this case. The appellants, as sub-contractors, gave notice to Goebel, the owner of the premises, on the 15th day of February, 1860, of their claim, and proceeded to file their lien on the 25th of the same month. By the 18th section of the mechanics' lien law, specially applicable to St. Louis county, every person, except the original contractor, who desires to avail himself of the benefit of the act, is required to give ten days' notice, before the filing of the lien, to the own-

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er or his agents, stating that he holds a claim against the building or improvement, setting forth the amount, and from whom the same is due. The notice here is sufficient if we exclude the 15th and include the 25th, or if we include the 15th and exclude the 25th ; but if we exclude both days, as contended for by the counsel for the respondents, but nine days remain, and the notice is insufficient and the lien lost.

As to how time shall be computed, is a matter which has been litigated ever since the existence of the common law. In the computation of the period of time, the contest has generally been, which day shall be included and which excluded ; but it would be difficult to extract any uniform rule from the jarring and conflicting decisions on the question. Our statute, to put all doubt at rest and insure certainty, has declared, that the time within which an act is to be done, shall be computed by excluding the first day and including the last—R. C. 1855, § 1027, § 22. This is a statutory exposition of the common law, and necessarily leads to the exclusion of the first day. But does the proper construction of the 18th section of the mechanics' lien law require that the last day should be excluded also ? It requires ten days' notice before the filing of the lien ; but, by the well established rules of construction in such cases, where the first day is excluded the last day is included ; and we cannot see that the Legislature intended to change this rule by the passage of the act in reference to liens. Where the statute in regard to the taking of depositions required that at least three days' notice, before the day of the taking of the depositions, should be served on the adverse party, and the notice was served on the 19th of September, and the 22d day of the same month was the day designated for taking the depositions, the notice was held sufficient—*Littleton v. Christy*, 11 Mo. 390. Had both days, the 19th and 22d, been excluded, there would have been but two days' notice, but the rule was adopted excluding the first and including the last. In the case at bar, if we exclude the 15th day of February, the day on which the notice was given, and include the 25th, on which day the lien was filed, there

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will still remain ten days' notice. It follows, therefore, that the notice was sufficient.

The judgment will be reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

J. B. KALTWASSER v. GEORGE BAUMAN *et als.*

Appeal from St. Louis Land Court. Affirmed upon same point.

JAMES GORMAN, Appellant, v. CLEMENS DIERKES, Respondent.

1. *Evidence—Names.*—Where the spelling of a foreign name does not materially vary the sound, as Doerges for Dierkes, in the German language, it is not a misnomer.
2. *Practice—Pleading.*—Where the petition upon a mechanic's lien alleged that ten days' notice of lien had been given, and the answer did not specifically deny the averment as to time, the allegation as to time must be taken as admitted.

Appeal from St. Louis Circuit Court.

Gray, for appellant.

Taussig, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon a mechanic's lien. The questions presented relate to the sufficiency of the notice; and it is objected, first, that the notice gave the name of the sub-contractor, from whom the amount of the demand was due, as "Clemens Dierges," when his right name was "Clemens Dierkes," in the German language; and, second, that it was not proved that the notice was given ten days before the filing of the lien.

There was some evidence tending to show that this name was frequently pronounced Doerges, with *g* hard, by persons not familiar with German words, and that the party himself

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sometimes answered to the name so pronounced. Where the spelling of a foreign name does not materially derange the sound, as *Petris* for *Petrie*, in French, or the party is as well known by the one pronunciation as the other, it is not a misnomer—*Petrie v. Woodworth*, 3 Cai. R. 219. We think the names were *idem sonans*, and as nearly correct as ordinary people can be expected to attain to, when these foreign names come into general use among us.

As to the time of the notice, we think it was sufficiently proved. The petition alleged that ten days' notice had been given as required by law. The answer did not specifically deny this averment as to time, but took issue on the sufficiency of the notice generally. The sufficiency was established by the evidence in every particular except the time, and on this point it tended to show more than ten days' notice before the filing of the lien. The lien was filed on the 29th of November, and the witness stated that he received the notice in October or November. Whatever uncertainty there was about this proof, we think the objection was fully obviated by the state of the pleadings. The specific averment of ten days' notice was not in terms denied. The allegation might have been more specific; but such as it was, not being specifically denied, we think it should have been taken as admitted.

The court below decided that the notice proved to have been given, was not sufficient in law to enable the plaintiff to avail himself of the benefit of the act concerning mechanics' liens. According to the views herein expressed, we must hold this decision erroneous. The other instructions need not be particularly noticed; upon a new trial, they may be framed in accordance with this opinion.

Judgment reversed, and cause remanded. Judge Wagner concurs; Judge Lovelace absent.

Hause v. Carroll.

WILLIAM HAUSE, Defendant in Error, *v.* JOHN CARROLL,
IMPLEADED, &c., Plaintiff in Error.

1. *Mechante's Lien — Practice.*—A party seeking to enforce a mechanic's lien upon a building, must show that he furnished the materials for the building under a contract either with the owner of, or the contractor for, the building —Hause v. Thompson, 36 Mo. 450.
2. *Practice — Exception — Supreme Court.*—A party cannot present in the Supreme Court a matter of exception not presented in the court below.

Error to St. Louis Land Court.

McClure and Wickham, for plaintiff in error.

The defendant in error in this case is not entitled to a lien against the property of the plaintiff in error, Carroll :

1. For there was no contract between him and Carroll, the owner of the land. The petition and evidence both show that the bricks in question were sold by defendant in error to one Thompson, who had no contract with Carroll, but, on the contrary, sold the bricks as an article of merchandise to Bridwell, and was paid for them; Bridwell afterwards furnished the bricks to Hockham & Fenn, the contractors, and he alone, if any one, is entitled to a lien for them—Porter et al. v. Tookey et al. 35 Mo. 107; Steinmetz v. Boudinot, 3 S. & R. 541; Hills v. Elliot, 16 S. & R. 56.

2. There was no privity of contract between the defendant in error and the plaintiff in error, Carroll. All liens must be founded upon contracts, direct or indirect, express or implied, with the owner of the estate sought to be charged—Clark v. Brown, 25 Mo. 560; Squires v. Fithian, 27 Mo. 138; Harlan v. Rand, 27 Pa. 515; Consociated Pres. Society v. Staples, 23 Conn. 559; id. 637; 17 Wend. 550; 22 Wend. 395; 26 Miss. 126.

3. There is no evidence in the record to show that notice of this lien was given to plaintiff in error, Carroll, at least ten days before the filing of the lien—Heltzell v. Hynes, 35 Mo. 482; Schubert v. Crowley, 33 Mo. 564.

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Peacock, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The point made in this case by the plaintiff in error, as to the sufficiency of the notice, cannot be urged in this court, as no objections were made to it in the court below. There was an averment in the petition, that the statutory notice was given preparatory to filing the lien, and the court, as the trier of the fact, was the appropriate tribunal to judge whether the evidence supported the averment. A party seeking to enforce a mechanic's lien upon a building, must show that he furnished the materials for the building, under a contract either with the owner of, or the contractor for, the building—*Hause v. Thompson et al.*, 36 Mo. 450. There was evidence tending to prove that Thompson, one of the defendants, purchased the bricks of the plaintiff for Carroll's house, and that they were received by the contractors; but in what capacity he purchased them does not appear by the witness. There was evidence also going to show that he bought them absolutely of the plaintiff, on his own individual responsibility, and then sold them to a man by the name of Bridwell, and received pay for them, and that Bridwell sold them to the contractors, who paid them their full value.

The defendants requested the court to declare the law, that if it, sitting as a jury, found from the evidence that the bricks in question were purchased by defendant Thompson from plaintiff, and sold by said Thompson to defendant Bridwell, and paid for by said Bridwell, and also sold by said Bridwell to defendants Hockham & Fenn (the contractors), then plaintiff has no lien on defendant Carroll's premises in question; which the court refused to do. We think the instruction should have been given. It is plain, that if the plaintiff sold the bricks to Thompson, on his own private liability, and he sold them to another party, who furnished them to the contractors, the plaintiff is not entitled to a lien on the premises. His contract was with Thompson, and he must look to Thompson for his pay. There was evidence

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going strongly to sustain this view of the case, and the defendants were entitled to have it submitted to a jury.

Reversed and remanded. Judge Holmes concurs; Judge Lovelace absent.

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HENRY STODDARD, Plaintiff in Error, *v.* JOHN J. MURDOCK,
Defendant in Error.

1. *Pleading—Contract.*—A party suing upon a contract for a stipulated consideration for services rendered, and averring performance, must show a reason for abandoning the contract price and seeking a recovery upon the *quantum meruit*.
2. *Equity—Mistake.*—A party seeking to correct a contract upon the ground of mistake of fact, must show in his petition how he is injured by such mistake.

Error to St. Louis Court of Common Pleas.

Demurrer to a petition. The petition is as follows:

County of St. Louis, *ss.*—The plaintiff, by leave of court, comes and files this his third amended petition, and states that one Amos Stoddard died intestate in the year 1813, seized in fee simple of three hundred and fifty arpents of land in the county aforesaid, being a Spanish concession to one Mordecai Bell, who conveyed the same to James Mackey, who conveyed the same to the said Amos Stoddard. The said tract of land was afterwards surveyed under authority of the United States, and a survey and plat thereof (numbered 3026) was recorded in the office of the Surveyor General of the United States for Illinois and Missouri.

That said Amos Stoddard left four brothers and two sisters his sole heirs-at-law, to whom his said title to said land descended; that one of said heirs was his brother Philo Stoddard, who afterwards died, leaving three sons and two daughters his sole heirs-at-law, to whom his title in said land descended; that the names of said sons of Philo Stoddard were Truman, Anthony and William, and the names of said daughters were Arva and Lucy.

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Plaintiff states further, that afterwards all of said heirs-at-law of said Amos Stoddard, or their heirs, except said Truman Stoddard, by their deeds of conveyance, conveyed to Luke E. Lawless in fee an undivided fifth part of said land; that afterwards said Lawless conveyed said fifth part to Hamilton R. Gamble, who conveyed the same to Adam L. Mills and William Beaumont.

Plaintiff states further, that although the title to said tract of land had been and was vested in the heirs-at-law of said Amos Stoddard deceased, as aforesaid, yet the premises were held and occupied prior to and on the 12th day of October, 1837, by persons who claimed adversely to the title of said Amos Stoddard and his said heirs, and it became necessary for said heirs to institute suits at law in ejectment to obtain possession of said premises; and for that purpose, and to carry on the said litigation, all of said heirs-at-law of said Amos Stoddard, or their heirs, except said Truman Stoddard, entered into a contract in writing with plaintiff, dated said 12th day of October, 1837, whereby they agreed that plaintiff should use his best endeavors to perfect the title of said heirs to said land, and should cause a suit or suits for the recovery of the possession thereof to be instituted in the United States Circuit Court for the District of Missouri; and when said title should be established, and possession so recovered, that plaintiff should make sale of said land, or any part thereof, and out of the proceeds of such sale plaintiff should be paid any and all sums of money which he then had paid, or might thereafter pay, including his travelling expenses in and about said litigation, and that, in addition thereto, he should have ten per centum of the amount of the proceeds of said sales, for his compensation for services rendered under said contract.

Plaintiff states further, that thereupon he proceeded to perform said contract on his part; perfected said title; instituted sundry suits in said court; expended and paid out large sums of money in carrying on said litigation; and

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finally, in the year 1850, did obtain and recover possession of said land.

Plaintiff states further, that after said 12th day of October, 1837, and before the recovery of the possession of said lands, the title to said lands became wholly vested in him by divers conveyances, except the interests of Truman, Anthony and William Stoddard, and excepting the interests which had been previously conveyed to Mills and Beaumont as aforesaid, and that the said interests of Anthony and William (excepting the one fifth by them conveyed to said Lawless) became vested in defendant by conveyance in due form.

Plaintiff states further, that defendant acquired his said interest in said land with full knowledge of and subject to the conditions and stipulations of said contract of October 12, 1837, and that said services so performed by him were done for the benefit in part, and at the request of the defendant; and that the reasonable value of said services to the defendant is five thousand dollars, for which he prays judgment, with interest and costs.

Plaintiff further states, that on the 1st day of April, 1851, plaintiff and defendant and said Mills and Beaumont, by deed, of partition, aparted and set off to said Mills and Beaumont, and released to them, forty-two and seventy-hundredths acres of said tract, in the south-east corner thereof, as and for their one fifth of said tract, and that Mills and Beaumont by the same deed aparted, set off and released the remainder of said tract to plaintiff and defendant, to be held by them in the rates of their respective interests, as and for their four fifths of said tract; and that said Mills and Beaumont also paid to plaintiff and defendant a large sum of money, hereinafter more particularly specified, in consideration of said release to them, said Mills and Beaumont.

Plaintiff further states, that afterwards, to-wit, on the 28th day of June, 1851, the plaintiff and defendant made a contract in writing of that date, in these words, viz:

“ *Memorandum.—Henry Stoddard, of Dayton, O., and*

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John J. Murdock, of St. Louis, Mo., being the owners, and holding the title to about two hundred and forty-five acres of land near St. Louis, part of the tract known and called the Stoddard tract, of three hundred and fifty arpents, said Stoddard holding eleven twelfth parts, and said Murdock holding the interest of two of the heirs-at-law of Philo Stoddard, understood to be one twelfth part of said two hundred and forty-five acres, have agreed to have said land surveyed and divided into blocks (except six and twenty-eight hundredths acres in the south-west corner of the tract, to which P. Lindell sets up an adverse claim), and said survey and division is to be made by streets and alleys, with corner-stones fixed designating corners, &c.; and, when so surveyed and divided, the parties are to make a public sale of the property (except said six and twenty-eight hundredths acres) after giving public notice of the time and place of sale; the sale to be on terms of a small part of the principal to be paid at the time of sale, and the balance on credit of one, two, three, four, and five years: the sale to commence on the first day of October next.—June 28, 1851. (Signed duplicates.) J. J. Murdock, H. Stoddard. Test: H. W. Leffingwell."

Plaintiff states further, that in pursuance of said contract of October 12, 1837, and of said last above-mentioned agreement, he and defendant made sale of said lands (described in said agreement) on the tenth, eleventh and twelfth days of September, 1851, and conveyed the same to the purchasers thereof, with covenant of warranty in some cases, and without warranty in others, and received the proceeds thereof in money and notes, the last of which became due and was paid in the year 1856. The plaintiff says the amount of said sales was the sum of \$684,337.85.

Plaintiff states further, that during all the time aforesaid, and until about the year 1852, it was supposed and believed, by both the defendant and himself, that said Philo Stoddard had died leaving but four heirs, viz., Anthony, William, Arva and Lucy Stoddard, and that consequently plaintiff and defendant held the whole title of said Amos Stoddard to the said

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tract of land, except said one fifth held by Mills and Beaumont, as aforesaid, in the following shares—the plaintiff, twenty-two twenty-fourth parts thereof, and the defendant, two twenty-fourth parts thereof, whereas, in truth and in fact, the plaintiff and defendant only held twenty-nine thirtieths of the interest and title of said Amos Stoddard, in the following shares, to-wit—the plaintiff, twenty-seven thirtieth parts of said title, and the defendant, two thirtieth parts of said title;—that said agreement between plaintiff and defendant, and the sale of their interest thereunder aforesaid, and the division of the proceeds of said sale, were made under said mistake of fact; that, after said sale, said defendant claimed and retained of the proceeds of said sale money and notes to the amount of one twelfth of said proceeds, viz., the sum of \$57,028.15, whereas, in fact, according to the interest of said defendant actually sold and conveyed by him, the defendant was only entitled to two twenty-ninth parts thereof, to-wit, the sum of \$47,195.72; that the plaintiff only received eleven twelfth parts of said proceeds, to-wit, \$627,-342.73, whereas he was entitled to twenty-seven twenty-ninth parts thereof, to-wit, the sum of \$637,142.13.

Plaintiff prays that the error thus made, arising out of a mistake of fact, not known to the parties, may now be corrected, according to justice and equity, by this court; and that the plaintiff may have judgment for the sum of \$9,832.-43, being the difference to which plaintiff is entitled, with interest.

Plaintiff further states, that the sum which was paid by said Mills and Beaumont to defendant and himself, in consideration of the partition made as aforesaid, amounted to \$5,403.09; that of this sum the defendant, then acting under the mistake aforesaid, claimed to be entitled to, and received, one twelfth part thereof, viz., the sum of \$450.25, whereas he was entitled to only two twenty-ninth parts thereof; and the plaintiff received only eleven twelfth parts thereof, viz., the sum of \$4,952.84, whereas he was entitled in equity to twenty-seven twenty-ninths thereof by virtue of

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the titles respectively conveyed by them; that the difference, to-wit, the sum of \$77.63, is justly due to plaintiff, for which, with interest, he prays judgment.

Krum & Decker, for plaintiff in error.

T. T. Gantt, for defendant in error.

I. The first count of the petition is bad in this, that after disclosing a contract for the doing of certain things, for a specific compensation, it avers performance on the part of plaintiff, and, observing silence as to the receipt of the stipulated compensation, claims an entirely different compensation.

II. It is consistent with the first count, that plaintiff received the stipulated compensation in full, which is, in any event, all that he can claim under the contract of Oct., 1837.

III. The second and third counts are bad, because they show that plaintiff and defendant, having claims to a tract of land which they supposed to constitute the full title thereto, sold the same by a quit-claim deed, and divided the money according to their supposed respective interests, and that it afterwards appeared that an interest was outstanding, a portion of which both plaintiff and defendant supposed that they held; consequently, that neither plaintiff nor defendant had so large an interest in the property as they had both supposed; and that from this state of facts the plaintiff claims to recover from defendant any excess received by him in respect of any interest sold by him by quit-claim, to which defendant's title is alleged to have failed. That is, defendant having sold a twelfth of certain land by quit-claim for a certain sum, and having received the money, a person who is a stranger to the outstanding title assumes that defendant has received all such money as represents the outstanding title, to the use of this stranger.

WAGNER, Judge, delivered the opinion of the court.

The demurrer in this case seems to have been well taken. The petition is clearly defective. The first count sets out and discloses a contract for the performance of certain servi-

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ces, for a stipulated compensation, with an averment of performance on the part of plaintiff. The services are alleged to have been rendered for the benefit, and in part at the request of the defendant.

What particular part was done at the request of the defendant, or why, after alleging a contract, and stating its terms, the contract price is abandoned, and a recovery sought on a *quantum meruit*, does not appear. There is nothing in the other parts of the petition to show that the rights of the parties have been varied, or materially altered, by the alleged mistake.

Plaintiff makes no averment that any person is claiming the share supposed to be outstanding, or that he has been compelled to pay anything on covenants of warranty, in consequence of conveyances made at his and defendant's sale. Nor is there any allegation that any liability has resulted against him on account of the mistake. It is not set out with sufficient definiteness how the property was sold, and what kind of conveyances were delivered. If it was deeded by quit-claim, so that no recourse can be had of the vendors, and plaintiff has not purchased the outstanding title, so as to acquire any new rights, the agreement entered into will not be disturbed as long as the parties occupy the same relation.

Judgment affirmed. Judge Holmes concurs; Judge Lovelace absent.

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PIERRE A. BERTHOLD AND AMEDÉE BRRTHOLD, Appellants,
v. JULIETTE V. REYBURN *et al.*, Respondents.

1. *Contract—Payment—Tender.*—To make a tender of payment of money valid, as a general rule, the money must be actually produced and proffered unless the creditor expressly or impliedly waive its production. The creditor may not only waive the production of the money, but the actual possession of it in hand by the debtor. Nor is the debtor bound to count out the money if he has it and offers it, when the creditor refuses to receive it. A tender puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs when sued for the debt.
2. *Payment—Tender—Demand.*—A party making a tender of payment, must be always ready to pay the amount tendered. To avoid the plea of tender by a subsequent demand, the creditor must show a demand of the precise sum tendered. The demand must be made of the debtor personally.

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Appeal from St. Louis Land Court.

In this case, the petition set forth that on the 10th March, 1860, Pierre Berthold executed to Juliette V. Reyburn his promissory negotiable note for \$7,000, and also six interest notes, each for \$350—the first payable in three years after date, and the interest notes at intervals of six months, and all bearing interest after maturity at ten per cent. per annum; that, to secure the payment of these notes, Amedée Berthold executed a deed of trust, conveying certain land therein described to the trustee of Mrs. Reyburn; that all of the interest notes were paid, and also all accruing interest down to 10th March, 1864; that on the 5th of July, 1864, plaintiff tendered to the defendant, Juliette V. Reyburn, the amount of principal and interest then due on the said note for \$7,000, being \$7,233.35, in United States legal tender notes, which offer was refused, for the reason that defendant demanded and would receive gold only; that plaintiff has ever since remained and still is ready and willing to pay defendant said principal and interest so tendered, and now offers and asks leave to pay the same into court, in full discharge of said note and deed of trust. Plaintiffs further alleged that, since the tender aforesaid, defendant has never demanded the same; they therefore prayed judgment, &c.

The answer of Juliette V. Reyburn admitted the making of the deed and notes, and the payment of interest to the 10th of March, 1864, but denied the alleged tender on the 5th July, 1864, and denied that the plaintiffs have been since the 5th July, 1864, ready and willing to pay said money; stated that the principal sum of \$7,000, and interest thereon, had been repeatedly demanded, to-wit, in February, 1865, and that payment was refused by said plaintiffs; and she asked the court to decree the payment to her of \$7,000, and interest from 10th March, 1864; which being paid, she was ready and willing to release the mortgaged property.

The case was tried by the court, neither party requiring a jury, on the 19th December, 1865. By the bill of exceptions

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it appears that the plaintiffs called as a witness R. A. Bakewell, who testified as follows:

"In the latter part of June, 1864, I was employed by Mr. Tesson, as agent of Mr. P. A. Berthold, to see Mrs. Juliette V. Reyburn and pay her the amount due on note dated 10th March, 1860, at three years, for \$7,000, with ten per cent. interest from 10th March, 1864. Accordingly, I called to see Mrs. Reyburn at her house. She informed me that she had seen her attorney, Mr. Todd, and as he was of the opinion that she would have to receive U. S. notes in payment, and could not require gold, she had concluded to take it, and was willing to receive the amount in U. S. notes. Afterwards, on the 5th July, 1864, I went down to the banking-house of Tesson & Danjen to get the money, for the purpose of paying Mrs. Reyburn. Mr. Tesson took from the counter a money package in a letter envelope, marked on the back with figures. I took that package and was proceeding towards Mrs. Reyburn's house, and when on Olive street I met Mrs. Reyburn, and said to her, 'I am glad to meet you, madam. I have the money to pay Mr. Berthold's note, and I was going up to pay it.' She said, 'You need not put yourself to any trouble, Mr. Bakewell; for, since I saw you last, I have consulted with Mr. Gantt, and have been advised not to take the amount otherwise than in gold.' I said, 'Then it will still be necessary for me to see you at your house, for I must count out the money to you and offer it.' She said, 'It is not necessary to do so. I wont take it except in gold.' I said, 'You must excuse my being particular, Mrs. Reyburn, because there will probably be a suit here, and a technical question will arise.' I then produced the package, and said, 'Mrs. Reyburn, here is the amount due on that note in legal tender notes. You say you don't want me to count it.' She said she did not. I said, 'I now tender you the amount due on Mr. Berthold's note, in legal tender notes,' and I offered her the package. She said, 'I wont take it.' I said, 'Do you object to it because it is not the correct amount?' She said, 'No, I wont take it except

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in gold.' I then said, 'Mrs. Reyburn, you object to receive this money only on the ground that it is not in gold, and for no other reason?' She said, 'Yes.') And then, after passing the usual compliments, we separated."

And on cross-examination, the witness said: ("I never counted the money in the package, nor saw it counted, and cannot say of my own knowledge how many notes it contained, nor the amount of them.) Between the 10th and 21st of February, 1865, Mrs. Reyburn's counsel called several times at the office of Mr. Farish, and left word for him that he wished to see him respecting the payment of the money due Mrs. Reyburn from Berthold. On the 5th of July, 1864, when I had the interview with Mrs. Reyburn, spoken of, gold was very high, perhaps as much as \$150 premium, or \$250 for \$100 of gold. I think it was not so high then as it afterwards became. In February, 1865, it was lower, being about 70 or 80 premium, or \$170 or \$180 paper for \$100 in gold. I do not know that the money market was stringent in February, 1865."

Plaintiff next called as a witness Edward T. Farish, who testified as follows: "As the attorney for Mr. Berthold, after the tender spoken of by Mr. Bakewell, I commenced suit, similar to the present one, in the St. Louis Circuit Court; the defendant demurred for want of jurisdiction in the court. About the 8th of February, 1865, the demurrer was sustained. On the 10th of February, 1865, I met Mr. Gantt, who was defendant's counsel, in court, and the following conversation ensued between us: He asked me what I should do. I told him I should commence suit in the Land Court. He said, 'will you make a new tender?' I told him no, that one tender was sufficient. He then turned the conversation by inquiring if I had seen Mr. Shepley. About four o'clock in the afternoon of that day, Mr. Gantt came into my office (I was then actually engaged in re-writing the petition to commence suit in this court,) and said, 'You understood me this morning that we would take the money?' 'Yes,' I replied, 'I understood you that you would take the amount

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tendered, with interest.' He then said, 'We will take the amount tendered.' I said, 'without interest?' He assented, and said, 'Bear in mind the amount will now bear interest, or interest will now run on the amount tendered.' I told him that I was very glad to understand him; that I had not so understood him in the morning.

"I immediately wrote to my client, Mr. Berthold, informing him that Mr. Gantt had agreed to take the sum of seven thousand two hundred and thirty-three dollars and thirty-five cents, the amount tendered on 5th July, 1864, and that interest would now run on the amount, at ten per cent. That evening, Mr. Berthold called to see me, and inquired if the amount should be paid at once. I told him no; but that as the amount was now drawing interest, the sooner he paid it the better.

"On the 21st of February, 1865, I met Mr. Gantt, and upon his inquiring about the money, I told him I would see to it. He then intimated that it not having been paid, they would claim interest from the start. I told him that the understanding was, that the amount tendered was to draw interest from February 10th, 1865; that neither I nor my client had understood the matter in the way he did.

"I immediately saw Mr. Berthold, went to Mr. Gantt's office, and what occurred is evidenced by a paper of which Mr. Gantt has the original; which was thereupon read in evidence. It is as follows:

"'Mr. Farish, this 21st day of February, 1865, at 2 P. M., handed me the check of Berthold & Thompson, of that date, numbered 317, on Tesson & Danjen, payable to the order of Bakewell & Farish, for seventy-two hundred and fifty-four 71-100 dollars (\$7,254.71), and declared that the same was tendered in payment of a note for seven thousand dollars executed by Pierre A. Berthold to Juliette V. Reyburn, dated 10th March, 1860, at three years from date. On the part of Mrs. Reyburn I offered to take the check for the money tendered, at its face, on account of said note and interest from its maturity, but not in full payment thereof, and

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Mr. Farish, declined to endorse and deliver the check upon such terms.

THOS. T. GANTT, for Mrs. J. V. Reyburn.
BAKEWELL & FARISH, for P. A. Berthold."

On cross-examination, witness said he had heard of Mrs. Reyburn's counsel calling to see him during his absence from his office, between 10th and 21st February, 1865, respecting this business.

This was all the evidence in the cause. The plaintiffs insisted, 1st. That the tender made the 5th July, 1864, was a good and valid tender. 2d. That tender puts a stop to accruing interest, and gives costs to the party making the tender. 3d. That to do away with the effect of the tender a demand must be made of the precise amount tendered; there must be a refusal to pay said demand; and that the pleadings and the proof showed no such demand and refusal.

The court dismissed the bill.

The defendant asked the court to reform the judgment, by decreeing foreclosure.

Farish, for appellants.

I. That the tender made July 5th, 1865, was a good and valid tender.

II. That tender before action brought puts a stop to accruing interest, and gives costs to the party making the tender.

III. That to do away with the effect of the tender, a demand must be made of the precise amount tendered, and there must be a refusal to pay said demand.

1. The words and action of respondent were a waiver of the actual opening of the package, and of all objections except to the specific character of the funds. The production and tender to respondent of what is admitted to have been a package of paper money, and of what was evidently legal tender notes, was a sufficient production of money to satisfy the requirements of law. "The actual production of the money is dispensed with by express declaration of the cred-

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itor that he will not accept it, or by some equivalent act." This is the language of Chitty's note to Blackstone—III., 303, note 19. See authorities there cited. See also, Jackson v. Jacob, 5 Scott, 79; Blight v. Ashley, 1 Peters, C. C. 24; 3 Stephens Nisi-Prius, p. 2600; Read v. Goldring, 2 M. & S.; 86; Finch v. Brook, 1 Scott, 70; Harding & Davis, 2 Carr. & P. 77; Gilmore v. Holt, 4 Pick. 258; Polglass v. Oliver, 2 C. & J. 15; Brown v. Saul, 4 Esp., N. P. C. 267; Nickenson v. Shee, 4 Esp. 4, 68; Black v. Smith, 1 Peake, 121; Barker v. Packinham, 2 Wash. C. C. R. 142.

2. To stop interest and give costs, the payment of the money into the court may be required when the tender is made after action brought; but not as in this case, where the tender is made before the suit is instituted—*Stor. Cont.* § 1001; *Chit. Cont.* 793; 2 Stark. Ev. 781; *Dent v. Down*, 3 Camp. 296.

3. Not only must there be a demand of the precise amount, but there must be a *refusal to pay*—*Rivers v. Griffiths*, 5 B. & Ald. 630; *Shybey v. Hide*, 1 Camp. 181; 22 Vt. 440; 2 Greenl. Ev. § 608; *Coore v. Callaway*, 1 Esp. 115.

The pleadings and the proof show no such demand and refusal. The answer alleges that the respondent demanded the amount of the note and interest, and the proof showed that so far from there being a refusal to pay the amount tendered, there was consent to do so, and an agreement that the amount was thereafter to bear interest at ten per cent., and subsequently there was no demand. There was an intimation on 21st February, that respondent would claim interest from the start, and thereupon appellant, in pursuance of agreement, offered to pay the amount tendered, with interest accrued since 10th February, 1865, to-wit, \$7,254.71, in payment of the note. The respondent refused to accept it, except on account of the note and interest from maturity of same. To have paid it on these conditions imposed by the respondent herself would have been a solemn admission that appellant owed the amount of the note, and interest from

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maturity of same; which was not true, for interest had been paid for one year after maturity of note, as admitted by the answer subsequently filed in the cause.

As a tender must be unconditional, so a demand is not only an admission that the precise amount is due, but is also an offer to accept the tender without conditions. Hence you cannot demand a larger amount than was tendered.

T. T. Gantt, for respondent.

Upon the statement agreed upon by the parties, and printed herewith, the respondent submits:

I. That whatever may have been the effect of an offer made in the street on July 5th, 1864, of a package of paper never counted by the witness, and of the contents of which he knows nothing, there was a new demand made on 10th February, 1865, and again on 21st February, 1865, neither of which was complied with, and this destroys the effect, if any, of the offer made in July previous—Coles v. Bell, 1 Camp. 478.

II. That the coupling of a condition with the offer to endorse and deliver to respondent's attorney on the 21st February, 1865, a check which plaintiff claimed to be for the full amount due—the condition being that the respondent would give a receipt in full on taking the check—and the refusal of the appellant to pay it unconditionally, vitiated all previous tenders, if they had been ever so numerous—Thayer v. Brackett, 12 Mass. 465; Eastland v. Langhorne, 1 Nott & McCord, 194; Hume v. Peploe, 8 East, 48; Glascott v. Day, 5 Esp. 48; Huxham v. Smith, 2 Camp. 21; Evans v. Judkins, 4 Camp. 156.

"The tender must be unconditional and unqualified, because if the creditor was to accept it, the claim for any residue might be thereby prejudiced; therefore a tender of a named sum, insisting at the same time on a receipt in full, or upon condition that it shall be received as the full balance due, or as a settlement, or that a particular document shall be delivered up to be cancelled, is insufficient"—1 Chit. Gen.

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Pract. 508, citing 2 Camp. 21, 4 Camp. 156, and 4 Carr. & Payne, 237. This usually careful writer has here been betrayed into an inaccurate or loose expression. To make his statement correct, he should have said: "The tender must be unconditional and unqualified, because if the creditor were to accept a sum of money with condition or qualification, the claim for any other or different sum might be thereby prejudiced."

The respondent submits that the law as here laid down is decisive of the present controversy. Every thing else—all that had taken place prior to 21st February, 1865—may be laid out of view. Then, at any rate, it was understood that the respondent was willing to receive treasury notes for the amount due on the note she held of appellants, and there was a controversy as to how much was due. Instead of making this tender, he offered to pay a certain sum on conditions—and refused to pay it, or any thing else, otherwise. This is only saying that he refused either to pay or to tender anything.

III. A plea of tender ought to show that defendant has always been ready from the date of tender to pay, &c.—3 Chit. Pl. p. 955 & seq.; id. 1020-1. And to a plea of tender plaintiff may reply a subsequent demand and refusal—1 Camp. 181; 3 Chit. Pl. 1155. Of course all these *allegata* must be supported by corresponding *probata*. But in this case the testimony shows (omitting all view of the merits of the tender in July, 1864,) a failure or delay from 10th to 21st February, 1865—and this defeats all the effects of the affair on the street of July 5th, 1864, whatever these may have been. The written memorandum signed by both parties, showing the occurrences of the 21st February, 1865, renders it unnecessary to consider any other part of the testimony. Appellant owed money—it was his duty to ascertain the amount and pay or tender it; that is, he should pay it if his creditor would receive it, or he should *tender* it if his creditor would not allow him to pay it—*tender* it without any condition or limitation. As between the creditor and debtor,

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it is the business of the debtor to move first. He owes a debt—he should pay it. Having done this, he can call on his creditor to give a quittance or release, if the law requires the creditor to give such a thing. Now, our law (2 Rev. Co. 1855, § 21 & 22, pp. 1091–2) does in certain cases, of which the case at bar is one, require of the mortgagee to give such a release. But need I detain the court by insisting that the first thing to be done is to pay the debt, and *then* call on the mortgagee to release the security? Appellant refused to pay it except on condition that respondent would waive her claim for anything more, and that puts an end, summarily and decisively, to all that had been previously said and done in the name of tender.

WAGNER, Judge, delivered the opinion of the court.

That the tender made on the 5th day of July, 1864, by the plaintiffs' agent to the defendant was good, is not seriously questioned in this case. (As a general rule, to make a tender of money valid, the money must be actually produced and proffered, unless the creditor expressly or impliedly waives this production;) and the creditor may not only waive the actual production of the money, but the actual possession of it in hand by the debtor—2 Pars. Cont. 642, 5th ed. Nor is the debtor bound to count out the money, if he has it and offers it when the creditor refuses to receive it—*Wheeler v. Knapp*, 8 Ohio, 169; *Breed v. Hurd*, 6 Pick. 356.

A tender puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs—*Coit v. Houston*, 3 Johns. Cas. 243; *Cornell v. Green*, 10 S. & R. 14; *Law v. Jackson*, 9 Cow. 641. Here the plaintiffs were willing and ready to pay the amount, produced the money and tendered it in U. S. notes; but the defendant refused to receive it, and the only objection made was that she would receive nothing but gold.

A plea of tender, to be effective, must show that defendant has always been willing and ready to pay the amount from the date of tender. The plaintiff may avoid the plea of

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tender by showing a subsequent demand and refusal, but to have this effect he must show that the demand made was of the precise sum tendered, a variance being fatal—2 Greenl. Ev. § 608; Spreyberg v. Hide, 1 Campb. 181; Thutford v. Hubbard, 22 Vt. 440; Dixon v. Clark, 5 Com. Bench, 378; Haskell v. Fawcett, 11 Mees. & W. 356. Now, the first question is, did the assent of defendant's attorney, on the 10th day of February, 1865, amount to such a demand, and the failure to pay immediately, to such a refusal, as to avoid and do away with the previous tender?

The evidence of demand is not satisfactory. The only testimony is that of Mr. Farish, the plaintiffs' attorney, who states that about four o'clock in the afternoon of that day (10th February), Mr. Gantt (defendant's attorney) came into his office and said, "You understood me, this morning, that we would take that money?" "Yes," I replied; "I understood you would take that amount, with interest." He then said, "We will take the amount tendered." I said, "without interest?" He assented, and said, "Bear in mind, the amount will now bear interest; or, interest will now run on the amount tendered." I told him that I was "very glad to understand him; that I had not so understood him in the morning." He then testified that he immediately wrote to plaintiffs, informing them that defendant had agreed to take the amount tendered in July, 1864, and that interest would run from the date of the agreement; that plaintiffs came to see him, and inquired if the money should be paid at once, and he replied in the negative, but said, as the amount was drawing interest, the sooner it was paid the better. On the 21st of February he again met Mr. Gantt, who inquired about the money, and he then intimated, that, it not having been paid, they would claim interest from the start; to which witness replied, that the understanding was, that it shonld draw interest from the 10th of February. On the same day on which this conversation took place, he procured a check for the precise amount tendered, and went to Mr. Gantt's office and tendered it to him in payment of the

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debt. Mr. Gantt offered to take the check for the money tendered, at its face, on account of the note and interest from maturity, but not in full payment, and the witness declined to endorse and deliver the check upon such terms. It would be giving great latitude to the meaning of language to construe the conversation and mutual understanding between the attorneys into such a demand as would avoid the tender. It appears they had two interviews before they understood each other as to the acceptance of the amount, and then it was agreed that interest should run thereafter till final payment. There was an assent and an intimation that it would be received; but the law requires a demand and a refusal of the precise sum tendered, and we would dislike to lay it down as an established rule that there was a sufficient compliance with these requirements in this case.

But there is another objection; the demand, if any, was made of the attorney, and not of the debtor. A tender may be made by an agent, or to an agent, where he is authorized to receive the money; but a demand ought to be made personally of the debtor, in order that he may have an opportunity of paying the money demanded—*Edwards v. Yeates, Ry. & Mood. 360; Coles v. Bell, 1 Campb. 478, n.*

Nothing being shown sufficient to avoid or destroy the effect of the tender, and the plaintiffs being entitled to the relief they ask in their petition, the judgment will be reversed and the cause remanded. The other judges concur.

A motion for re-hearing was filed by respondent, and was overruled.

HERMAN DETERS, Plaintiff in Error, *v.* ROBERT M. RENICK,
Defendant in Error.

Mechanics' Liens—St. Louis County.—The special act relating to mechanics' liens in St. Louis county (Sess. Acts 1857, p. 671) is not in conflict with, and does not repeal, the provisions of the 10th section of the general statute upon the same subject (R. C. 1855, p. 1068), and the provisions of that section are applicable to liens in said county.

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Error to St. Louis Circuit Court.

G. A. Finkelnburg, for plaintiff in error.

The repealing clause in the act of February 14, 1857, is a limited one ; it expressly excepts such parts of former acts as are not contrary to, or inconsistent with, the provisions of this act.

The remedy afforded by the 10th section of the act of 1855 is the only express provision of law for cases of this kind. The St. Louis act makes no mention of it, and contains nothing inconsistent with such a remedy ; on the contrary, the right itself is expressly recognized by the 1st section, which confers two distinct liens, one upon the building, and one upon the ground—Act 14th February, 1857, § 1.

The St. Louis act does not exhaust the subject, but is supplementary in its character—Schulenburg v. Gibson, 15 Mo. 281. In that case the same point arose under the special St. Louis county act of 1843, respecting mechanics' liens, and the court gave effect to the general law of 1845 in regard to a remedy not provided for in the special law of 1843. It will be noticed, that the repealing clauses in the special laws of 1843 and 1857 are identically the same—Wibbing v. Powers, 25 Mo. 599, where the same doctrine is laid down.

Implied repeals are not favored in the law—White v. Johnson, 23 Miss. (1 Cush.) 68 ; Casey v. Harned, 5 Clark, Iow. 1 ; Hockaday v. Wilson, 1 Head, Tenn. 14 ; Erwin v. Moore, 15 Ga. 361.

Where an act of the Legislature repeals laws, and parts of laws, militating against the act, a prior statute is repealed only to the extent of its conflicting provisions—Elrod v. Gil-liland, 27 Ga. 467.

Lackland, Cline & Jamison, for defendant in error.

It will be noticed, upon comparing the sections of the two acts, that six of those in the act of 1857 are precisely the same as six of those in the act of 1855 ; these are §§ 13, 14, 15, 16, 17 and 19 of the act of 1855, which are severally the

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same as §§ 8, 9, 10, 11, 12 and 14 in the act of 1857. So § 18 of the act of 1855 is the same as § 13 of the act of 1857, with an immaterial variation.

It will also be noticed that § 5 of the act of 1857 is similar in terms and in its provisions to § 10 of the act of 1855, being the one upon which the plaintiff relies. But the 5th section does not adopt the whole of the 10th section in the act of 1855; but that provision of the 10th section upon which plaintiff relies, is not included, adopted, or mentioned, in any part of the act of 1857.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff filed his lien in the St. Louis Land Court, upon a building belonging to one R. F. Bridwell, for materials furnished. He afterwards obtained judgment, in the same court, for the value of the materials, amounting to the sum of two hundred and eighteen dollars and sixty-seven cents, upon which execution issued, and the sheriff sold the building at public vendue, and the plaintiff became the purchaser thereof. The ground upon which the building was erected had been conveyed by deed of trust, prior to the filing of plaintiff's lien, and was subsequently sold at trustee's sale to the defendant, who entered into the possession of the premises. The defendant refusing to allow plaintiff to enter on the premises for the purpose of removing the building, this proceeding was instituted by plaintiff, in conformity with the 10th section of the law respecting mechanics' liens (2 R. C. 1855, p. 1068), to enforce his rights. The court sustained a demurrer to the petition, on the ground that the 10th section of the general law was repealed and superseded by the law of 1857 for the securing of liens on buildings to mechanics and others, and especially applicable to St. Louis county.

The only question to be determined in this case is, whether a party in St. Louis can pursue his remedy under the 10th section of the general law relating to mechanics' liens, or whether that section is repealed or rendered inoperative by the special law of 1857. By § 20 (Laws of 1857, p. 671),

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"all acts, or parts of acts, contrary to, or inconsistent with, the provisions of this act, so far as the same apply to the county of St. Louis, are hereby repealed." From the language here used, it clearly appears that it was not the intention of the Legislature to repeal the whole law, but only such parts as were contrary to, or inconsistent with, the special law. There is nowhere in the special law any provision substituted for the 10th section, nor is there anything repugnant to it; and whilst the law is complete so far as it goes, there is nothing to supply the object for which the 10th section was designed. The section is not repealed in express terms, and it will not be construed as repealed by implication, unless it is so repugnant to the special law as to be wholly irreconcilable. No such repugnancy is perceived to exist.

The judgment is reversed, and the cause remanded.

Judge Holmes concurs; Judge Lovelace absent.

GEORGE W. PUTNAM, Plaintiff in Error, *v.* ISAAC WALKER,
Defendant in Error.

Highways—Dedication.—To constitute a dedication of a highway by the making of a plat, the plat must be acknowledged and recorded in the manner provided for town plats—R. C. 1855, p. 1535. To constitute a dedication by user, there must be an intention to dedicate on the part of the owner, with such acceptance or user by the public, for such a length of time, that the public accommodation or private rights would be materially affected by an interruption of the enjoyment, though for less than twenty years.

Error to St. Louis Common Pleas Court.

Calvin & Martin, for plaintiff in error.

Glover & Shepley, for defendant in error.

HOLMES, Judge, delivered the opinion of the court.

The action was founded upon a supposed breach of covenant of title in a deed. The breach consisted in an alleged dedication of a portion of the land conveyed to public use as

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an alley. The plaintiff relied, first, upon a plat which accompanied a report of commissioners in partition, and, second, acts showing an intent to dedicate the ground to public use, with acceptance and user on the part of the public, as evidence of a dedication. The plat did not amount to a dedication under the statutes. It did not designate this alley by its precise length and width. It was not acknowledged in the manner of deeds, nor deposited with the recorder of the county, to be preserved as a part of the records of his office, in like manner with town plats—R. C. 1835, p. 599; Sess. Acts 1839, § 8 & 9.

Deeds may adopt a plat, and call for streets, in such manner as to show an intention to dedicate the land to public use—3 Kent. Com. 554; 19 Wend. 128. But the several conveyances of this land from Auguste Chouteau to the plaintiff contained no such adoption of this plat in respect of this alley; nor did they call for the alley, in any way. As to what effect the deed made to Hoffman, calling for an alley in the rear of the lot conveyed to him, might have between the parties thereto, we need not undertake to say: it did not amount to any such dedication as can affect the rights of the parties in this case.

Dedication may take place in three ways: under statutes, by immemorial usage, or by acts showing an intention to dedicate the ground to public use, together with an acceptance or user on the part of the public for such length of time that the public accommodation or private rights would be materially affected by an interruption of the enjoyment, though for less than twenty years—2 Greenl. Ev. § 662. There was no evidence before the jury on which they could have been warranted in finding a dedication in this way; and the instruction for defendant was properly given.

Judgment affirmed. The other judges concur.

Ewald v. Waterhont.

HENRY EWALD, Appellant, *v.* NICHOLAS WATERHONT, Respondent.

Judgment—Estopel.—A party who has recovered personal property by judgment in a suit in replevin, cannot be sued in trespass by the defendant for the wrongful taking of the same property.

Appeal from St. Louis Law Commissioner's Court.

Morehead, for appellant.

Peacock, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit for the wrongful taking of the plaintiff's horse. On the trial, the plaintiff gave evidence tending to prove that he was the owner of the horse mentioned in his petition, and the value of the horse, and there rested his case. No evidence whatever was offered on his part to show that the defendant had taken his horse, or even had possession of the horse, wrongfully or otherwise.

The defendant put in evidence a transcript of the proceedings of a justice of the peace, in a suit of replevin for this horse, in his own favor and against this plaintiff, by which it appeared that the plaintiff therein had recovered judgment; and it was proved that the horse had been seized by the constable, and delivered to the defendant herein, under the writ of replevin.

It is clear that, on the case made, the plaintiff was not entitled to recover at all. His instructions were rightfully refused.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace not sitting.

Dyer v. Krayer.

CHARLES DYER, Plaintiff in Error, *v.* FREDERICK C. KRAYER,
Defendant in Error.

Practice—Pleading—Note.—A petition upon a note by an endorsee must allege the endorsements by which the plaintiff claims title. The note and its endorsements are no part of the petition, and cannot be made such by reference thereto.

Error to St. Louis Court of Common Pleas.

P. C. Morehead, for plaintiff in error.

Hill & Babcock, for defendant in error.

HOLMES, Judge, delivered the opinion of the court.

The case is presented here on demurrer to the petition. The demurrer being sustained, and the plaintiff refusing to amend the petition, there was judgment for the defendant on the demurrer. The petition was founded upon a negotiable note payable to the order of George W. Goode. It contained no distinct allegation of the endorsements through which the plaintiff derived title to the note, but averred that "said note was endorsed to the plaintiff by L. A. Darue, for value received, who, as appears by the endorsements thereon, was the endorsee of the said George W. Goode, whereby the plaintiff, who is the holder, and the last endorsee thereof, is entitled to the same."

The ground of demurrer was, that the petition did not set forth a sufficient cause of action, for the reason that it did not aver that the note was ever endorsed by the payee to L. A. Darue, nor show that the plaintiff had any claim or legal interest in the note, or any right to bring this suit.

The usual averment of an endorsement is, that the one party endorsed and delivered the note to the other. The allegation that "the note was endorsed to the plaintiff by L. A. Darue, for value received," might be deemed sufficient; but as to the endorsement of the payee to Darue, there is no positive averment whatever, but only that he was endorsee

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as appears by the endorsements thereon. The endorsements were no part of the petition. It was not enough that it should so appear on the note filed. There should have been some distinct and positive averment of the fact in the petition; then the note might have been admissible in evidence to prove the allegation. We think the demurrer was well taken.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace not sitting.

[CONTINUED TO VOL. XXXVIII.]

I N D E X.

A

ACTIONS.

See PRACTICE, CIVIL. POSSESSION. EQUITY. CONTRACTS. BILLS OF EXCHANGE.

1. *Slander—Pleading.*—When the slanderous words used do not of themselves impute to the plaintiff the commission of a crime or offence involving moral turpitude, or some infamous punishment, the petition must contain an averment of the extrinsic matter necessary to show that the words are actionable. The words "he is a bushwhacker" are not actionable *per se*. Where the ground of complaint is that the plaintiff has been injured in his character, reputation, or business, the action cannot be maintained without an averment that the words were spoken of the plaintiff in reference thereto, and the words become actionable by reason of some special damage which must be averred and proved as laid.—*Curry v. Collins*, 324.
2. *Trespass—Damages—Attachments.*—Where several attachments are successively levied upon goods not the property of the attachment debtor, the attachment creditors are not joint trespassers, and are not liable to contribution as such (R. C. 1855, p. 649); but where several creditors, thus attaching, are sued as joint trespassers, and judgment recovered, the judgment is conclusive as to their liability to contribution.—*Brewster et als. v. Gauss et al.*, 518.
3. *Strays—Possession.*—The possession of personal property which will authorize an action for its recovery must be a lawful possession. Where a party took up a stray, which he kept in his possession for a year without proceeding as a taker up of a stray animal under the statute R. C. 1855, p. 1506, he is to be treated as a trespasser *ab initio*, and cannot recover possession of the animal from a party into whose possession the animal may have again come as a stray.—*Bayless v. Lefavre*, 119.

ADMINISTRATION.

1. *Personality.*—The title to personal property, upon the death of the owner, passes to the administrator or executor, and he only can sue for the property or for an injury thereto.—*Smith et als. v. Denny et als.*, 20.
2. *Concealing Assets.*—The provisions of the statute, R. C. 1855, p. 130, §§ 10 & 11, apply only to cases where the person charged with concealing or embezzling the assets, has the goods in actual possession at the time of the commencement of the proceedings. If the property has passed from the possession of the person so charged, the common law rights of action still re-

ADMINISTRATION (Continued).

main to the executor, but he is precluded from further prosecuting the statutory remedy, because it would be unavailing.—Howell's Exec'r, v. Howell, 124.

3. *Evidence—Presumption.*—If it be shown that a party has possession of the assets of an estate after the death of a testator, the law presumes that such possession is continued, until the contrary is proven.—*Id.*

ARBITRATORS AND AWARDS.

1. *Practice—Supreme Court.*—It is too late to urge in the Supreme Court, as an objection to an award, that the arbitrators were not sworn; the objection should have been made in the court below.—Vallé v. North Missouri R.R. Co., 445.

2. *Award.*—It is not necessary, under the statute, that an award should be attested by a subscribing witness, unless the submission provides that the award shall be made the judgment of the Circuit Court, and be enforced according to the provisions of the statute. (R. C. 1855, p. 195, § 6.)—*Id.*

3. *Award—Mistake of Arbitrators.*—An award will not be set aside upon motion, or vacated for any mistake of law or fact that does not appear upon the face of the award itself. But where a court of equity is resorted to, to set aside an award on the ground of fraud, prejudice, or mistake, extrinsic evidence may be resorted to, and the arbitrators may themselves be witnesses. A court of equity will not relieve those who have not used due diligence to protect themselves.—*Id.*

ASSIGNMENTS.

1. *Account—Bill of Exchange.*—Under the statute, an account may be assigned in writing. A bill of exchange drawn upon a particular fund does not operate as an equitable assignment of the fund although the drawee promise to pay any balance that may be in his hands. (Kimball v. Donald, 20 Mo. 577.) —Ford v. Angelrodt et al., 50.

2. *Mortgage—Deed of Trust.*—A conveyance of property to trustees to sell, to pay the debts of the grantor, without condition, is an assignment for the benefit of the creditors named and preferred.—State to use, &c., v. Benoit et als., 500.

3. *Frauds.*—In general, a party may assign his property as he pleases; but where there are numerous creditors, he cannot use an assignment as a means of preserving his property from the lawful actions and demands of his creditors. An assignment made with intent to delay, hinder or defraud creditors, is fraudulent. Where such intent appears upon the face of the instrument, it will be declared void, as a matter of law. The essence of the fraud consists in the fact, that the deed is not made in good faith for the payment of honest debts, but for the advantage of the grantor, and for the purpose of postponing and defeating the just claims of creditors.—*Id.*

4. *Preferences.*—An assignor may make preferences, by making a partial assignment for the benefit of particular creditors, but in so doing the assignment must be made for the genuine purpose of paying honest debts, and not for the use and benefit of the grantor, nor to hinder, delay and defraud other creditors.—*Id.*

ATTACHMENTS.

1. *Estoppel—Record.*—A judgment against a garnishee summoned in an attachment suit is conclusive only upon parties to the suit, and does not affect strangers to the record. (*Funkhouser v. How*, 24 Mo. 44.)—*Dobbins et al. v. Hyde et al.*, 114.
2. *Residence.*—Where a defendant makes provision for his family and leaves them at his residence, although he may be personally absent an indefinite period of time, attending to his business, no attachment will lie, as the law has provided the mode by which process may be served; but where he leaves the country, and places his family with a relative to sojourn, the presumption is that he has no fixed place of abode.—*Adams' Adm'r v. Abernathy et al.*, 196.
3. *Execution—Garnishment.*—In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand, unaffected by liens or prior encumbrances, or conditions of contract.—*Scales et al. v. Southern Hotel Co.*, 520.
4. *Corporations—Stocks.*—Shares of stock in an incorporated company cannot be levied on by an attachment. The statute of this State has not changed the common law rule in such cases.—*Foster v. Potter*, 525.

ATTORNEYS.

1. *Practice—Demand.*—Before an attorney can be sued for moneys collected by him for his client, there must be a demand of payment, or a failure to remit, after a reasonable time, in accordance with instructions. If the petition fail to allege such demand, it will be defective on motion in arrest of judgment.—*Beardslee et al. v. Boyd et al.*, 180.

B**BAILMENTS.**

1. *Railroads—Negligence.*—Carriers of passengers not being insurers of their safety, are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed. They are not liable for mere accident, or misadventure, any more than for the act of God, or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the road. In addition to this, there must be some actual negligence, or want of strict care, diligence, and foresight.—*Sawyer et al. v. Hannibal & St. Jos. R.R. Co.*, 240.
2. *Railroads—Negligence.*—In a suit by a passenger on a railroad train for injuries occasioned by the cars being thrown into a chasm, occasioned by the burning of a bridge by the public enemy, of which defect in the road the conductor of the train was prevented from receiving notice by the agents and servants of the road being driven off or overawed by the enemy,—an instruction confining the issue of negligence to the particular case in the running of the cars, and telling the jury that “if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the carrier was not liable for the injury,” was improp-

BAILMENTS (Continued).

- erly refused, as it presented to the jury the principle that the defendant was not to be held liable for mere accident, in the absence of any want of that degree of care and prudence which the law requires. If it were not the negligence of the conductor of the train, or his want of care and foresight, that was the proximate or remote cause of the accident and injury, the carrier was not liable.—*Id.*
3. *Damages.*—The owner of a slave may recover damages of a bailee, for an injury done to the slave by an inhuman and cruel beating, in consequence of which the slave returned to his master before the time for which he had been hired had expired.—*Peters v. Clause*, 337.
4. *Carriers.*—Telegraph companies, whether regarded as common carriers or bailees, may specially limit their liabilities, subject to the qualification that they will not be protected from the consequences of gross carelessness. A telegraph company may reasonably require that, for the purpose of avoiding errors, the message shall be repeated, or that the company shall not be liable for any error in the transmission of the message.—*Wann v. Western Union Tel. Co.*, 472.
5. *Carriers — Negligence — Damages.*—Carriers of passengers are not insurers, but they are bound to the utmost care and skill in the performance of their duty. If the carrier be guilty of negligence which mediately or immediately produced the injury, and the party injured was not guilty of any negligence, carelessness, or imprudence, which directly contributed to the injury, the carrier will be liable.—*Huelsenkamp v. Citizens' Railway Co.*, 537.

BANKING, ILLEGAL.

1. *Notes.*—A note given to secure a loan made in foreign bank notes by a foreign corporation doing business by its agent in this State, is void, and notes given in renewal of such original note are also void.—*Bank of Louisville v. Young*, 398.

BILLS OF EXCHANGE AND NEGOTIABLE NOTES.

1. *Presentment.*—To bind the endorser of a negotiable note, a presentment at the place of business of the maker, and a demand there made, is sufficient.—*Bateson v. Clark et al.*, 31.
2. *Practice—Pleading.*—In a suit against the endorser, it is sufficient to set out the note according to its legal effect, and to allege that it was negotiable. It is not necessary to set out the note *in hec verba*.—(See *Jaccard v. Anderson*, 32 Mo. 188; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt*, 35 Mo. 461).—*Id.*
3. *Acceptance.*—The holder of a bill of exchange is entitled to an absolute and unconditional acceptance according to the tenor of the bill, and may reject any other. If he rely upon a conditional acceptance, he must show affirmatively that the condition has been complied with.—*Ford v. Angelrodt et al.*, 50.
4. *Waiver of Demand and Protest.*—A waiver of presentment and demand of payment of a negotiable note would imply and include a waiver of protest and of notice of non-payment, but a waiver of notice only would not be a waiver of demand. A "waiver of protest" would imply a waiver of presentment, demand, and notice. The waiver is a matter between the holder

BILLS AND NOTES (*Continued*).

- of the note and the endorser to be charged, and the agreement must be made between them.—Jaccard et al. v. Anderson, 91.
6. *Endorser—Waiver of Protest.*—An endorsement was made upon a negotiable note, before maturity, as follows: “I assign the within note to J. T. and hold myself responsible for the payment of the same; the said P. [maker] to have two years to pay the same, unless he prefers to pay sooner; interest on the same to be paid annually.” *Held*, that the endorsement was a waiver of demand and notice, and that the endorser was bound for the payment of the note, without any attempt to collect the amount due from the maker.—Airey v. Pearson et als., 424.
6. *Consideration—Contract.*—In a suit by payee upon a note given for goods sold, the maker may show in a defence of failure of consideration, that the goods were not as described and warranted at the sale, or that they were worthless for the purposes for which they were sold.—Murphy et al. v. Gay, 535.
7. *Fraud—Evidence.*—It is a good defence to a note that it was obtained by fraud and misrepresentation. On a question of fraud, the evidence may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, and explain the acts and intentions of the parties.—Smalley v. Hale, 102.

BONDS AND NOTES ASSIGNABLE.

1. *Assignor.*—A note payable in this State to A., or order, although not expressed to be for value received, imports a valuable consideration as between maker and payee, and as between payee and assignee. In a suit by the assignee against the assignor, the amount specified in the note is *prima facie* the amount for which the assignee is liable. Under our law there are three classes of notes: 1. Notes negotiable like inland bills of exchange, containing the words, “for value received, negotiable and payable, without defalcation”; 2. Notes payable to order, or bearer, or assigns, under the first section of the act relating to bonds, notes, &c. (R. C. 1855, p. 319); 3. Notes not drawn payable to order, or bearer, and containing no words of negotiability that can make them assignable under the statutes or otherwise than in equity.—Labadie’s Exec’r v. Chouteau et als., 413.

C**CONFLICT OF LAWS.**

1. *Husband and Wife—Domicil.*—Personal property is governed by the law of the domicil of the owner, and the law changes with the change of domicil. Where a wife, living in Kentucky with her husband, owned slaves, which, by the law of that State, were taken to be held as real estate, and were not subject to attachment or levy under execution for any debts of the husband, yet upon the removal of the parties to this State, bringing the slaves with them, the rights of the husband over the slaves will be determined by the laws of this State.—Minor et als. v. Cardwell et als., 350.
2. *Lex Loci.*—A note although made in another State, yet payable in this State, is to be governed by the laws of this State.—Labadie’s Exec’r v. Chouteau et als., 413.

CONFLICT OF LAWS (*Continued*).

3. *Interest*.—A corporation, created by the laws of another State, although forbidden by its charter to take more than six per centum interest, may, upon loans made in this State, charge the rate of interest allowed by our laws. The law of the place where the contract is to be performed will govern the rate of interest. One State will not enforce the usury laws of another State, in respect to contracts made within its own limits.—*Bank of Louisville v. Young*, 398.

CONTRACTS.

1. *Note—Fraud—Evidence*.—It is a good defence to a note that it was obtained by fraud and misrepresentation. On a question of fraud, the evidence may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, and explain the acts and intentions of the parties.—*Smalley v. Hale*, 102.
2. *Evidence*.—Where a contract for the grading of a railroad stipulated the price to be paid for the excavation and embankment of earth, including all materials except hard-pan, but fixed no prices for other kinds of excavation, upon a suit to recover the value of work done in excavating indurated earth, the plaintiff may show by evidence that the words "earth excavation" did not include indurated earth, for the purpose of showing that the price to be paid for such excavation was not fixed by the contract.—*Blair v. Corby*, 313.
3. *Fraud—Payment*.—Where a party sells land and takes in payment certificates of stock of an incorporated company, in the absence of any fraud or misrepresentation, he cannot recover for the price of the land because the stock subsequently turns out to be valueless.—*O'Donoghue v. Jones*, 371.
4. See CONFLICT OF LAWS, 3.
5. *Note—Consideration*.—In a suit by payee upon a note given for goods sold, the maker may show in a defence of failure of consideration, that the goods were not as described and warranted at the sale, or that they were worthless for the purposes for which they were sold.—*Murphy et al. v. Gay*, 535.
6. *Municipal Corporations*.—By an act of the General Assembly, commissioners were named and appointed to sign warrants to be issued by the City of St. Louis in payment of debts due by the city. Held, that there was no contract between the city and the commissioners that the city should pay them for their services, and that they could not recover.—*Garnier v. City of St. Louis*, 554.
7. *Performance—Action*.—Where a party enters into a contract for the sale and delivery of property at a stipulated price, the contract being entire, a full performance on his part is a condition precedent to a right of action for the price of any part of the property delivered.—*Bersch, Assignee, v. Sander*, 104.

CONSTITUTION.

1. *City of St. Louis—Evidence*.—The act of the General Assembly of January 16, 1860, § 2, which authorized the City of St. Louis to assess the cost of macadamizing streets against the owners of the property fronting upon such streets, and providing that the certificate of the city engineer shall be *prima facie* evidence of the validity of the charge against the property, and of the

CONSTITUTION (*Continued*).

liability of the party therein named as owner, is constitutional. The Legislature has power to provide a summary mode of collecting such taxes, and may declare what evidence shall be sufficient to show a *prima facie* case for the plaintiff.—*City of St. Louis to use, &c., v. Coons*, 44.

2. *Railroads—Ordinance*.—The ordinance of the Convention adopted April 8, 1865, does not suspend the right and power of the General Assembly to provide by law for a sale of the railroads, or either of them, until there is a refusal or neglect to pay the tax required to be imposed by the ordinance.—*Answer to Governor, Nov. 27, 1865*, p. 129.

3. *Railroads—Sale*.—No such sale can be made without reserving a lien upon all the property and franchises sold, for all sums remaining unpaid by the purchaser.—*Id.*

4. *Railroads—Stock*.—When a railroad shall be sold under the ordinance of April 8, 1865, the State cannot receive in payment shares of stock to be issued by the corporation purchasing such railroad. (Const. Art. XI., sec. 13.)—*Id.*

5. *Judicial Power, extent of, under Const., Art. VI., sec. 11*.—The Judges of the Supreme Court must determine what are questions of "Constitutional law," and what are "solemn occasions," within the meaning of sec. 11, Art. VI. of the new Constitution, upon which they must give their opinions. The questions to be answered must be questions of law only involving the construction or meaning of some part of the Constitution; and must be in their own nature judicial questions, the final determination of which belongs to the Judicial Department.—*Answer to Senate, Dec. 9, 1865*, p. 135.

6. *Departments*.—The Executive and Legislative departments of the Government are, in the first instance, the proper judges of the extent of their own constitutional powers and duties.—*Id.*

7. *North Missouri Railroad—Lien*.—The General Assembly had, at the time of the passage of the act of February 16, 1865, (Laws of 1865, p. 90,) the constitutional power to relinquish and release the first mortgage lien upon the franchises and property of the North Missouri Railroad as provided in said act.—*Answer to Governor, Jan. 22, 1866*, p. 139.

8. *Officers—Revenue*.—The sheriff is, by virtue of his office as sheriff, collector of the State and county taxes; the two offices are one and inseparable. The ordinance of the Convention, passed March 17, 1865, vacating the offices of sheriffs, &c., on May 1, 1865, deprived the sheriffs of all authority as collectors of the revenue. The offices were vacated altogether.—*Price v. Adamson*, 145.

9. *Practice—Jury*.—In trials at common law in courts of record, the parties are entitled to a jury of twelve men as a matter of constitutional right, and any consent to waive this right must be entered of record. If such consent do not appear of record, the party may avail himself of the objection by motion in arrest of judgment.—*Brown v. Hann. & St. Jo. R.R. Co.*, 298.

CONVEYANCES.

1. *Revenue—Lands*.—Under the Revenue Act of November 23, 1857, § 33, the deeds executed by the Register are *prima facie* evidence of title in the purchaser only when duly executed and recorded. A deed is not duly executed unless it be proved or acknowledged in the manner provided by

CONVEYANCES (*Continued*).

the "Act relating to conveyances"—R. C. 1855, p. 364. Without being proved or acknowledged, the deeds cannot be recorded.—*Stierlein v. Daley et al.*, 483.

2. See CORPORATIONS, MUNICIPAL, 2, 4.

CORPORATIONS, MUNICIPAL.

1. *Constitution—City of St. Louis—Evidence.*—The act of the General Assembly of January 16, 1860, § 2, which authorized the City of St. Louis to assess the cost of macadamizing streets against the owners of the property fronting upon such streets, and providing that the certificate of the city engineer shall be *prima facie* evidence of the validity of the charge against the property, and of the liability of the party therein named as owner, is constitutional. The Legislature has power to provide a summary mode of collecting such taxes, and may declare what evidence shall be sufficient to show a *prima facie* case for the plaintiff.—*City of St. Louis to use of Lohrum v. Coons*, 44.
2. *Revenue—City of St. Louis—Conveyances.*—A tax deed, made upon a sale of lands by the City of St. Louis for unpaid taxes, must show a strict compliance with the statute. (Acts 1857, p. 99, § 43.) All such statutes, authorizing proceedings which are to have the effect of divesting a citizen of his title to real estate, must be strictly construed and strictly pursued.—*Stierlein v. Daley et al.*, 483.
3. See CONTRACTS, 6.
4. *Revenue—Special Tax—Sale—Lands.*—The charter of the City of St. Joseph, approved Nov. 21, 1857, authorized the mayor and councilmen to provide for the improvement of the streets, alleys, &c., and that the cost should be borne by the owners of the adjoining property, and be apportioned and charged on the adjoining lots in proportion to their fronts, in such manner as should be prescribed by ordinance. The charter further provided that the assessments made to pay for such improvements should be a lien upon the lots of the adjoining owners, and that the owners should be liable to an action as upon like liabilities contracted by themselves; and also that the lien might be enforced by a special tax, levy and sale, as well as by proceedings at law, in such manner as might be prescribed by ordinance. By ordinance of Feb. 4, 1858, the city provided for the improvement of a street in front of several lots owned by plaintiff, and directed that if the bills for such improvements were not paid within ten days after demand by the collector they should bear interest at twenty per cent., and should be placed in the hands of the city attorney to be collected by proceedings at law. Subsequent to the improvement of the street in front of defendant's property, the city passed an ordinance amending that of Feb. 4, 1858, providing that the cost of such improvements should be enforced by a special tax, a levy, and sale. Under this amendatory ordinance, the city proceeded to levy upon the lots of the plaintiff and advertised them for sale in gross, without instituting any proceedings at law to enforce the lien. Upon a bill filed to enjoin the defendant from making such sale—*Held*, 1. That, as the action of the defendant tended to throw a cloud upon the title of the defendant, a bill for an injunction was a proper remedy. 2. That the proceeding

CORPORATIONS, MUNICIPAL (Continued).

to enforce collection of the cost of the improvements under the amendatory ordinance by a levy and sale was void, as the ordinance was retrospective in its operations, the work having been done under the ordinance which provided for the collection of the bills by a suit at law. 3. That the cost of the improvements should be charged to each several lot according to its front, and not to several lots in gross. 4. That where a party sets up a pretension to sell the land of another in such a manner as will work a divestiture of title, without judgment or judicial process, it will devolve upon him to show that he has strictly pursued the power conferring the right.—That no liberal or equitable construction can be permitted in such a case, nor any presumptions be allowed where the inevitable effect would be to deprive the citizen of his property without invoking the law of the land or the judgment of his peers.—*Fowler v. City of St. Joseph*, 228.

CORPORATIONS, RAILROAD.

1. *Constitution—Ordinance*.—The ordinance of the Convention adopted April 8, 1865, does not suspend the right and power of the General Assembly to provide by law for a sale of the railroads, or either of them, until there is a refusal or neglect to pay the tax required to be imposed by the ordinance.—*Answer to Governor*, 129.
2. *Constitution—Sale*.—No such sale can be made without reserving a lien upon all the property and franchises sold, for all sums remaining unpaid by the purchaser.—*Id.*
3. *Constitution—Stock*.—When a railroad shall be sold under the ordinance of April 8, 1865, the State cannot receive in payment shares of stock to be issued by the corporation purchasing such railroad. (*Const. art. 11, sec. 18.*)—*Id.*
4. *Constitution—North Missouri Railroad—Lien*.—The General Assembly had, at the time of the passage of the act of February 16, 1865, (*Laws of 1865*, p. 90,) the constitutional power to relinquish and release the first mortgage lien upon the franchises and property of the North Missouri Railroad as provided in said act.—*Answer to Governor*, 139.
5. See **BAILMENTS**, 1, 2, 5.
6. *Revenue—Corporations*.—The lands granted by the State to the Hannibal and St. Joseph Railroad Company by the act of Sept. 20, 1852, are not taxable for State and county purposes under the general revenue law. (*Laws 1863-4*, p. 65.) The property of the company is represented by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. (*See Hann. & St. Jo. R.R. Co. v. Shacklett*, 80 Mo. 550.)—*State v. Hann. & St. Jo. R.R. Co.*, 265.
7. *Negligence—Damages*.—In an action for damages against a railroad, for negligently managing its engines, so that fire was communicated to the standing grass and crops of the plaintiff, the burden of proof is upon the plaintiff, to show that the fire was caused by the negligence or want of care of the defendant. There is no legal presumption of negligence in such cases; it must be shown as a matter of fact.—*Smith v. Han. & St. Jo. R.R. Co.*, 287.
8. *Public Lands*.—The acts of Congress of June 10, 1852, and February 9, 1853, and the act of the General Assembly of September 20, 1852, amount-

CORPORATIONS, RAILROAD (Continued).

ed to a legislative grant of the even numbered sections of land within six miles of the roads named in said acts, as soon as the lands were designated by a definite location of the route of said railroads in the manner provided in said acts. It was not necessary that the maps, showing the definite location of the roads, should designate the particular sections which had been granted by the acts. The descriptive list of lands granted by the acts of Congress, certified by the Commissioner of the General Land Office, is presumptive evidence that the lands therein specified have been granted.—*Hann. & St. Jo. R.R. Co. v. Moore*, 338.

CORPORATIONS.

1. *Attachment—Stocks.*—Shares of stock in an incorporated company cannot be levied on by an attachment. The statute of this State has not changed the common law rule in such cases.—*Foster v. Potter*, 525.
2. *Executions—Stocks.*—Under the statute relating to executions—R. C. 1855, p. 742, §§ 23, 24—shares of stock in an incorporated company belonging to the defendant in the execution may be seized and sold by the sheriff in the manner provided in the act.—*Id.*
3. *Stocks—Mortgage—Execution.*—The equity of redemption of a judgment debtor in shares of stock may be levied upon and sold under execution, and the purchaser will succeed to all the rights of the debtor.—*Id.*
4. See **CORPORATIONS, RAILROAD**, 6.

CRIMES AND PUNISHMENTS.

1. *Receiving Stolen Goods—Criminal Practice.*—In an indictment charging the defendant with receiving stolen goods with a guilty knowledge, it is not necessary that the name of the person who stole the goods should be stated.—*State v. Smith*, 58.
2. *Criminal Practice—Receiving Stolen Goods.*—Where a defendant is charged with having received stolen goods jointly with others, he may be convicted if the evidence show that himself separately received the property.—*Id.*
3. *Malicious Trespass—Evidence.*—Upon the trial of an indictment for unlawfully and maliciously taking down and removing a house, evidence that the defendant removed the house at the request of one who occupied and had apparent control of the premises is admissible to rebut the malicious intent. (R. C. 1855, p. 584.)—*State v. Underwood*, 225.
4. *Malicious Trespass.*—Although the defendant may have taken down and moved a dwelling-house without authority, a malicious intent must be proven, and is not to be presumed from the want of authority.—*Id.*
5. *Criminal Practice—Indictment.*—(R. C. 1855, p. 567, § 39.) Indictment charging defendant with feloniously assaulting another with a deadly weapon, and feloniously wounding, &c., is good.—*State v. Ray*, 365.
6. *Larceny.*—The stealing of several articles of property at the same time and place, although belonging to several persons, constitutes but one offence.—*State v. Morphin*, 373.
7. *Larceny.*—Larceny is the wrongful or fraudulent taking and carrying away of the personal property of another, from any place, with a felonious intent to convert the same to the taker's use, and make it his own, without consent of the owner.—*State v. Gray*, 463.

CRIMES AND PUNISHMENTS (*Continued*).

8. *Murder*.—If the killing be done of preconceived anger and malice, although in mutual combat, it will be deliberate and premeditated murder.—*State v. Green*, 466.

D**DAMAGES.**

See **BAILMENTS**, 3, 5. **CORPORATIONS, RAILROAD**, 7.

Trespass—Attachments.—Where several attachments are successively levied upon goods not the property of the attachment debtor, the attachment creditors are not joint trespassers, and are not liable to contribution as such (R. C. 1855, p. 649); but were several creditors, thus attaching, were sued as joint trespassers, and judgment recovered, the judgment is conclusive as to their liability to contribution.—*Brewster et al. v. Gauss et al.*, 518.

DEPOSITIONS.

Evidence.—A copy of the testimony given by a deceased witness, upon the taking of his deposition, although signed by the witness himself, is not admissible in evidence when no notice was given of the taking of the deposition, nor opportunity allowed for cross-examination.—*Perry et al. v. Siter et al.*, 273.

E**ELECTIONS.**

1. *Majority*.—Where a proposition to issue bonds was submitted to a two thirds vote of the qualified voters of a city, it is sufficient if two thirds of the qualified voters who voted at the special election, voted in favor of the proposition.—*State ex rel. Bassett v. Mayor of St. Joseph*, 270.
2. *Practice—Pleading*.—A petition in a suit against the judges of an election precinct for wrongfully refusing the plaintiff's vote, must set out the facts which give the plaintiff a cause of action, and show how he was entitled to vote, by stating the qualifications which gave him the right.—*Curry v. Cabliss et al.*, 330.

EQUITY.

1. *Vendors and Purchasers—Equity*.—A purchaser of land with notice of the equities of a prior purchaser, takes the land subject to such equities.—*Gibson v. Lair et al.*, 188.
2. *Injunction—New Trial*.—A party who has failed to make his defence to a suit at law, and seeking the interposition of a court of equity, must show some substantial ground of relief which will bring the case under some head of equitable jurisdiction; such as fraud of the opposite party, uncontrollable accident, or mistake, unmixed with negligence or fault on his part. (*Matson v. Field*, 10 Mo. 100.)—*Reed's Adm'r et al. v. Hansard*, 199.
3. *Nuisance—Injunction*.—Equity will interfere by injunction in case of a direct, continuing, and permanent nuisance, without compelling the plaintiff to resort to repeated actions at law. To authorize this interference, there must be such an injury as from its nature is not susceptible of an adequate compensation by damages at law, or such as from its continuance must occasion a constantly recurring grievance, which cannot otherwise be prevented but by injunction. It is only necessary that a party

EQUITY (Continued).

should establish his right in an action at law preparatory to obtaining an injunction, where a question of title is involved, or the right itself is doubtful or uncertain. A purchaser of land may have his action for the continuance of a nuisance erected before his purchase was made. The keeping and standing of jacks and stallions within the immediate view of a private dwelling is a nuisance.—*Hayden v. Tucker*, 214.

4. See **CORPORATION, MUNICIPAL**, 4.
5. *Note—Injunction.*—A court of equity will enjoin the collection of a judgment recovered upon a note over-due by parties to whom it has been endorsed for collection only, and who thus hold the legal title, in favor of the maker who has paid or settled the amount due upon the note with the beneficial owners thereof, even as against an assignee of the suit. The assignee is bound to make inquiry into the title of his assignors.—*Perry et al. v. Siter et al.*, 273.
6. *Mistake—Parties.*—In a bill in equity, brought by the purchaser of land sold under a power given by a mortgage, to correct a mistake in the mortgage deed, the mortgagee is a necessary party.—*Haley v. Bagley*, 363.
7. *Mortgage—Vendors and Purchasers.*—A purchaser buying at a sale made by virtue of a power contained in a mortgage, buys at his peril.—*Id.*
8. *Trustee—Agent.*—A. being indebted to B. by note, as security for its payment transferred to B. a note of C.'s for a larger amount, secured by a deed of trust upon land, and the deed of trust itself. The note of C. not being paid, B. had the land sold by the trustee, and purchased at the trustee's sale. This land B. subsequently sold for an amount more than sufficient to pay the note of A. *Held*, that, in collecting the collateral note, B. was acting as the agent of A., and was subject to all rights and disabilities incident to that character, and could not, under the circumstances, speculate for his private gain, to the prejudice of his principal.—*Boardman v. Florez*, 559.
9. *Mistake.*—A party seeking to correct a contract upon the ground of mistake of fact, must show in his petition how he is injured by such mistake.—*Stoddard v. Murdock*, 580.
10. *Jurisdiction.*—Where a court of equity acquires jurisdiction of the subject matter, it will proceed to do complete justice between the parties.—*McDaniel et al. v. Lee et al.*, 204.
11. *Vendors and Purchasers—Title.*—A vendor may enforce a specific performance of a contract for the sale of lands, if he can show a good title at the time of trial or decree.—*Luckett v. Williamson*, 388.
12. See **MORTGAGES, 1. USES AND TRUSTS, 1.**

ERROR.

See **PRACTICE CIVIL** and **PRACTICE CRIMINAL**.

ESTOPPEL.

1. *Highways—Dedication.*—To constitute a dedication of private property to public use, at common law, there must be, 1st, a plain and unequivocal intention on the part of the owner to appropriate the property for public use, and, 2d, there must be an acceptance by user or otherwise on the part of

ESTOPPEL (Continued).

- the public. In a dedication under the statute, by making and filing a plat, no acceptance by the public need be shown. Although as against his grantees the owner of land may be estopped from denying the fact of dedication, where he has granted lands calling for a street or a highway as a boundary, yet as against the public neither he nor his grantees are estopped until acceptance and user be shown.—*Becker v. City of St. Charles et al.*, 13.
2. *Attachment—Record.*—A judgment against a garnishee summoned in an attachment suit is conclusive only upon parties to the suit, and does not affect strangers to the record. (*Funkhouser v. How*, 24 Mo. 44.)—*Dobbins et al. v. Hyde et al.*, 114.
3. *Estoppe in pais.*—To constitute en estoppel *in pais*, there must be an admission inconsistent with the claim set up; an action by the other party upon such admission, and an injury resulting to him by allowing such admission, to be disproved.—*Newman v. Hook*, 207.
4. *Judgment—Practice.*—If a judgment be erroneous or irregular, it must be reversed or vacated in a direct proceeding instituted for that purpose. In a suit upon the judgment, its conformity to law cannot be inquired into.—*Martin et al. v. Barron*, 301.
5. *Judgment—Evidence.*—A conviction for an offence, also punishable by the laws of the State, by virtue of the ordinances of a municipal corporation authorized by its charter to punish similar offences, is a bar to a subsequent prosecution by the State. Where the record of the conviction under the ordinances of such corporation does not show conclusively the identical offence of which the party was convicted, parol evidence is admissible to show the identity of the offence.—*State v. Thornton*, 360.
6. *Judgment.*—A party who has recovered personal property by judgment in a suit in replevin, cannot be sued in trespass by the defendant for the wrongful taking of the same property.—*Ewald v. Waterhont*, 602.
7. *Highways—Dedication.*—To constitute a dedication of a highway by the making of a plat, the plat must be acknowledged and recorded in the manner provided for town plats—R. C. 1855, p. 1585. To constitute a dedication by user, there must be an intention to dedicate on the part of the owner, with such acceptance or user by the public, for such a length of time, that the public accommodation or private rights would be materially affected by an interruption of the enjoyment, though for less than twenty years.—*Putnam v. Walker*, 600.

EVIDENCE.

1. *Hearsay.*—The testimony of a deceased witness at a former trial of a case is admissible in evidence if the same issues are presented, and his testimony was directed to the issues, thus giving an opportunity for cross-examination.—*Jaccard et als. v. Anderson*, 91.
2. *Hearsay.*—The declarations of one who is a competent witness at the trial are not admissible in evidence.—*Howell's Exec'r v. Howell*, 124.
3. *Crimes—Malicious Trespass.*—Upon the trial of an indictment for unlawfully and maliciously taking down and removing a house, evidence that the defendant removed the house at the request of one who occupied and had ap-

EVIDENCE (*Continued*).

- parent control of the premises is admissible to rebut the malicious intent. (R. C. 1855, p. 584.)—*State v. Underwood*, 225.
4. *Deposition*.—A copy of the testimony given by a deceased witness, upon the taking of his deposition, although signed by the witness himself, is not admissible in evidence when no notice was given of the taking of the deposition, nor opportunity allowed for cross-examination.—*Perry et al. v. Siter et als.*, 273.
5. *Estoppel—Judgment*.—A conviction for an offence, also punishable by the laws of the State, by virtue of the ordinances of a municipal corporation authorized by its charter to punish similar offences, is a bar to a subsequent prosecution by the State. Where the record of the conviction under the ordinances of such corporation does not show conclusively the identical offence of which the party was convicted, parol evidence is admissible to show the identity of the offence.—*State v. Thornton*, 360.
6. See CONTRACTS, 2.
7. *Payment—Receipt*.—A receipt to be evidence of payment must be in the possession of the party purporting to have paid the money; while in the possession of the creditor it is no evidence of payment by the debtor.—*Nelson v. Boland*, 432.
8. *Crimes—Larceny*.—The possession of stolen property recently after its loss, is presumptive evidence of guilty possession, and if unexplained by attending circumstances, or the character of the possessor or otherwise, is taken as conclusive.—*State v. Gray*, 463.
9. *Names*.—Where the spelling of a foreign name does not materially vary the sound, as Doerges for Dierkes, in the German language, it is not a misnomer.—*Gorman v. Dierkes*, 576.
10. *Criminal Practice—Receiving Stolen Goods*.—Upon an indictment for receiving stolen goods, knowing them to have been stolen, the State must prove that the property was stolen and that the defendant received the property knowing it to have been stolen; and all the acts which go to prove the fact of the stealing are properly admissible in evidence as part of the *res gestae*.—*State v. Smith*, 58.

EXECUTIONS.

1. *Lands*.—Under the provisions of the act relating to executions (R. C. 1855, p. 746, § 46), the plaintiff in the execution is required to give notice to the defendant of the issue of the writ, &c., only in cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued.—*Harris v. Chouteau et al.*, 165.
2. *Levy—Sale—Lands*.—The levying of an execution upon lands after the return day of the writ, and a sale made upon such levy, are void acts, and the purchaser takes no title; but when the levy is made during the life of the writ, the sale may be made after its return day. (R. C. 1855, p. 748; Acts 1863, p. 20, § 2.)—*Bank of the State of Mo. v. Bray et al.*, 194.
3. *Levy—Sale*.—To pass title to personal property by a levy and sale under execution, the sheriff must actually seize the property so as to deliver the possession.—*Newman v. Hook*, 207.

EXECUTIONS (Continued).

4. *Corporations—Stocks.*—Under the statute relating to executions—R. C. 1855, p. 742, §§ 23, 24—shares of stock in an incorporated company belonging to the defendant in the execution may be seized and sold by the sheriff in the manner provided in the act.—*Foster v. Potter*, 525.
5. *Corporations—Stocks—Mortgage.*—The equity of redemption of a judgment debtor in shares of stock may be levied upon and sold under execution, and the purchaser will succeed to all the rights of the debtor.—*Id.*
6. *Lands.*—A judgment creditor purchasing the land of the execution debtor upon a sale made under execution issued upon a judgment satisfied, takes no title. The sale upon a satisfied judgment is absolutely void as to purchasers with notice.—*Weston v. Clark*, 568.

F**FORCIBLE ENTRY AND DETAINER.**

See *JUSTICES' COURTS*.

1. *Unlawful Detainer—Landlord and Tenant.*—The time of the service of the notice of the demand for possession of the premises is the time of the demand. Where the premises are let for a fixed period of time, no demand of possession is necessary to authorize the bringing of an action for the unlawful detainer.—*Alexander et al. v. Westcott*, 108.
2. *Unlawful Detainer—Complaint.*—A complaint in unlawful detainer, alleging that the plaintiffs were the owners and entitled to the possession of the premises; that they leased the premises to defendant for one year from a given date, and that defendant wilfully continued to hold and does hold over the possession after the expiration of the time the premises were demised, is sufficient.—*Id.*

FRAUD.

See *BILLS OF EXCHANGE*, 7. *CONTRACTS*, 3.

FRAUDS, STATUTE OF.

Vendors and Purchasers.—A purchaser may insist upon the defence of the statute of frauds, although he confess the parol agreement. (R. C. 1855, p. 1238, § 47.) A part performance, by the vendee, of a parol contract for the sale of lands will not avail the vendor.—*Luckett v. Williamson*, 388.

FRAUDULENT CONVEYANCES.

1. *Assignments.*—In general, a party may assign his property as he pleases; but where there are numerous creditors, he cannot use an assignment as a means of preserving his property from the lawful actions and demands of his creditors. An assignment made with intent to delay, hinder or defraud creditors, is fraudulent. Where such intent appears upon the face of the instrument, it will be declared void, as a matter of law. The essence of the fraud consists in the fact, that the deed is not made in good faith for the payment of honest debts, but for the advantage of the grantor, and for the purpose of postponing and defeating the just claims of creditors.—*State to use, &c., v. Benoit et als.*, 500.
2. *Assignments—Preferences.*—An assignor may make preferences, by making a partial assignment for the benefit of particular creditors, but in so doing,

FRAUDULENT CONVEYANCES (Continued).

the assignment must be made for the genuine purpose of paying honest debts, and not for the use and benefit of the grantor, nor to hinder, delay and defraud other creditors.—*Id.*

G**GENERAL ASSEMBLY.**

Compensation—Auditor.—The members of the General Assembly are entitled to pay only for the days they serve; and where, by a concurrent resolution of the Senate and House of Representatives, both Houses took a recess or adjourned for several days, the members are not entitled to pay during such recess. The Auditor may inquire into the legality of the Speaker's warrant.—*State ex rel. McMurtry v. Auditor*, 176.

GUARDIAN AND WARD.

Partition.—Infants interested in lands may join as parties plaintiff, by their curator, in seeking a partition; and when all the owners of the land agree, they may all join as plaintiffs in seeking a partition *ex parte*. (*Thornton v. Thornton*, 27 Mo. 303, and *Waugh v. Blumenthal*, 28 Mo. 462, approved.)—*Larned v. Whitehill*, S. P., affirmed.—*Larned & wife v. Renshaw*, 458.

H**HIGHWAYS.**

1. *Dedication—Estoppel.*—To constitute a dedication of private property to public use, at common law, there must be, 1st, a plain and unequivocal intention on the part of the owner to appropriate the property for public use, and, 2d, there must be an acceptance by user or otherwise on the part of the public. In a dedication under the statute, by making and filing a plat, no acceptance by the public need be shown. Although as against his grantees the owner of land may be estopped from denying the fact of dedication, where he has granted lands calling for a street or a highway as a boundary, yet as against the public neither he nor his grantees are estopped until acceptance and user be shown.—*Becker v. City of St. Charles et al.*, 13.

2. *Dedication.*—To constitute a dedication of a highway by the making of a plat, the plat must be acknowledged and recorded in the manner provided for town plats—R. C. 1855, p. 1535. To constitute a dedication by user, there must be an intention to dedicate on the part of the owner, with such acceptance or user by the public, for such a length of time, that the public accommodation or private rights would be materially affected by an interruption of the enjoyment, though for less than twenty years.—*Putnam v. Walker*, 600.

HUSBAND AND WIFE.

1. *Conflict of Laws—Domicil.*—Personal property is governed by the laws of the domicil of the owner, and the law changes with the change of domicil. Where a wife, living in Kentucky with her husband, owned slaves, which, by the law of that State, were taken to be held as real estate, and were not subject to attachment or levy under execution for any debts of the husband, yet upon the removal of the parties to this State, bringing the slaves with them, the rights of the husband over the slaves will be determined by the laws of this State.—*Minor et als. v. Cardwell*, 350.

I

INJUNCTION.

See EQUITY, 2, 3, 5. CORPORATIONS, MUNICIPAL, 4.

INSURANCE.

1. *Policy—Deviation—Warranty.*—A time policy was issued upon a steamboat, which excepted the navigation of certain waters. After the issue of the policy, the boat made a trip upon the forbidden waters, and returned safely to port, and while in port was subsequently destroyed by fire. *Held*, that by the terms of the policy the insurance of the boat, while navigating the permitted waters, did not constitute a warranty, but only an exception to the perils insured against, and that the insurers were liable upon their policy.—*Greenleaf et al. v. St. Louis Ins. Co.*, 25.
2. *Cause of Loss.*—A policy of insurance upon a building is an insurance upon the building as such, and not upon the materials of which it is composed. If from any defect of construction or overloading the building fall into ruins, and subsequently the materials take fire, the insurer is not liable for the loss.—*Nave et al. v. Home Mut. Ins. Co.*, 430.—

J

JUDGMENT.

1. *Attachment—Record.*—A judgment against a garnishee summoned in an attachment suit is conclusive only upon parties to the suit, and does not affect strangers to the record. (*Funkhouser v. How*, 24 Mo. 44.)—*Dobbins et al. v. Hyde et al.*, 114.
2. *Estopel—Practice.*—If a judgment be erroneous or irregular, it must be reversed or vacated in a direct proceeding instituted for that purpose. In a suit upon the judgment, its conformity to law cannot be inquired into.—*Martin et al. v. Barron*, 301.
3. *Estopel—Evidence.*—A conviction for an offence, also punishable by the laws of the State, by virtue of the ordinances of a municipal corporation authorized by its charter to punish similar offences, is a bar to a subsequent prosecution by the State. Where the record of the conviction under the ordinances of such corporation does not show conclusively the identical offence of which the party was convicted, parol evidence is admissible to show the identity of the offence.—*State v. Thornton*, 360.
4. *Estopel.*—A party who has recovered personal property by judgment in a suit in replevin, cannot be sued in trespass by the defendant for the wrongful taking of the same property.—*Ewald v. Waterhont*, 602.
5. *Securities.*—One of several securities against whom judgment has been recovered, cannot, upon paying the debt to the creditor, take an assignment of the judgment to himself and enforce payment thereof by execution against the property of his co-sureties.—*McDaniel et al. v. Lee et al.*, 204.
6. *Process.*—Where process has been served upon a defendant, and judgment by default entered, the court cannot at a subsequent term, upon the mere suggestion of defendant, set aside the judgment upon the ground of defective service of process.—*Bank of the State of Mo. v. Bray et al.*, 194.
7. See EQUITY, 2, 5.
8. *Practice—Equity.*—A settlement with a county court is equivalent to a judgment rendered by a court of competent jurisdiction, and will be set aside

JUDGMENT (*Continued*).

- only when impeached for fraud, by a proceeding in the nature of a bill in equity.—*Sullivan County v. Burgess*, 300.
9. *Justices' Courts—Limitations.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16.)—*Humphreys v. Lundy*, 320.
10. *Justices' Courts—Scire Facias.*—A *scire facias*, under the provisions of the statute (R. C. 1855, p. 951, §§ 7-9) to revive a justice's judgment, may issue after a lapse of ten years. The provisions of the act relating to judgments, (R. C. 1855, p. 902,) apply only to judgments of courts of record. —*Id.*
11. *Practice—Scire Facias—Justices' Courts.*—A *scire facias* to revive a judgment is not a suit upon the judgment, in which the plaintiff recovers the amount of the original judgment, with interest and costs. The proper entry, is to award execution for the amount of the original judgment, with interest from its rendition, and costs.—*Id.*
12. *Satisfaction.*—A judgment against several debtors, entered satisfied so as to discharge the lien as to one of the defendants, is satisfied as to all.—*Weston v. Clark*, 568.

JURISDICTION.

See EQUITY. PRACTICE, CIVIL. CONSTITUTION.

1. *Courts.*—By the act of February 18, 1859 (Laws 1859, p. 487, § 4), repealed by act of January 24, 1864, (Laws 1863-4, p. 307,) the St. Louis Circuit and Common Pleas Courts had concurrent jurisdiction with the St. Louis Land Court in all suits relating to lands, except those for the direct recovery of the possession of real estate.—*City of St. Louis to use, &c., v. Coons*, 44.
2. *Courts.*—The Law Commissioner's Court of St. Louis county has no jurisdiction in actions to enforce liens against real estate. (City to use, &c., v. Rudolph, 36 Mo. 465.)—*City of St. Louis to use, &c., v. Boyce et al.*, 429.

JURORS.

1. *Practice—Constitution.*—In trials at common law in courts of record, the parties are entitled to a jury of twelve men as a matter of constitutional right, and any consent to waive this right must be entered of record. If such consent do not appear of record, the party may avail himself of the objection by motion in arrest of judgment.—*Brown v. Hann. & St. Jo. R.R. Co.*, 298.
2. *Practice—Misbehavior.*—A traverse juror is not a competent witness to prove misbehavior in the jury. For a jury to make up the amount of the verdict by each juror naming a certain sum and then dividing the aggregate of the sums specified by the number of the jury, is an improper mode of making up the verdict, and is misbehavior on the part of the jury.—*Sawyer et al. v. Hann. & St. Jo. R.R. Co.*, 240.
3. *Criminal Practice.*—Jurors must be impartial and wholly unprejudiced. Where a juror upon his *voir dire* had sworn that he had never formed or expressed an opinion as to the guilt or innocence of the prisoner, and after verdict of guilty, the defendant moved for a new trial, for the reason that the juror had before the trial declared that he believed the prisoner to be guilty, which fact the defendant only learned after verdict, and filing affidavit of

JURORS (Continued).

respectable witnesses testifying to such expression of opinion on the part of the juror, the court should set aside the verdict and grant a new trial.—*State v. Burnside*, 343.

JUSTICES' COURTS.

1. *Judgments—Limitations.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16.)—*Humphreys v. Lundy*, 320.
2. *Judgment—Scire Facias.*—A *scire facias*, under the provisions of the statute (R. C. 1855, p. 951, §§ 7-9), to revive a justice's judgment, may issue after a lapse of ten years. The provisions of the act relating to judgments, (R. C. 1855, p. 902,) apply only to judgments of courts of record.—*Id.*
3. *Judgments—Scire Facias.*—A *scire facias* to revive a judgment is not a suit upon the judgment, in which the plaintiff recovers the amount of the original judgment, with interest and costs. The proper entry, is to award execution for the amount of the original judgment, with interest from its rendition, and costs.—*Id.*
4. *Revenue—Stamps.*—The act of Congress does not require that a stamp shall be affixed to the certificate of a justice of the peace certifying an appeal to the Circuit Court. The appeal is not an original process under our statutes.—*Norris v. Hann. & St. Jo. R.R. Co.*, 286.
5. *Appeals.*—When an appeal is taken from the judgment of a justice of the peace during the term of the Circuit Court, the transcript and papers must be filed in the Circuit Court within six days after the rendition of the judgment—R. C. 1855, p. 797, § 12.—*Bernicker v. Miller*, 498.

L**LANDLORD AND TENANT.**

See **FORCIBLE ENTRY AND DETAINER.**

Lease—Assignment.—If a lessee makes a general assignment "of all his property whatsoever," or of "all his property of every sort and description," for the benefit of his creditors, the trustee becomes bound as assignee of the lease if he accept the assignment and enter under the lease. The question to be determined in such case is, whether the assignee accepted the premises as tenant of the lessor and as assignee of the interest of the lessee.—*Boyce et al. v. Bakewell et als.*, 492.

LANDS AND LAND TITLES.

See **CORPORATIONS, MUNICIPAL**, 1, 2, 4. **CONVEYANCES**, 1. **STATUTE OF FRAUDS**, 1. **GUARDIAN AND WARD**, 1. **ESTOPPEL**, 1, 7. **EXECUTIONS**, 1, 2, 5.

1. *Revenue—Corporations.*—The lands granted by the State to the Hannibal and St. Joseph Railroad Company by the act of Sept. 20, 1852, are not taxable for State and county purposes under the general revenue law. (Laws 1863-4, p. 65.) The property of the company is represented by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. (See *Hann. & St. Jo. R.R. Co. v. Shacklett*, 30 Mo. 550.)—*State v. Hann. & St. Jo. R.R. Co.*, 265.

LANDS AND LAND TITLES (*Continued*).

2. *Railroads.*—The acts of Congress of June 10, 1852, and February 9th, 1853, and the act of the General Assembly of September 20, 1852, amounted to a legislative grant of the even numbered sections of land within six miles of the roads named in said acts, as soon as the lands were designated by a definite location of the route of said railroads in the manner provided in said acts. It was not necessary that the maps, showing the definite location of the roads, should designate the particular sections which had been granted by the acts. The descriptive list of lands granted by the acts of Congress, certified by the Commissioner of the General Land Office, is presumptive evidence that the lands therein specified have been granted.—*Hann. & St. Jo. R.R. Co. v. Moore*, 338.
3. *Pre-emption—Equity.*—*Hill v. Miller*, 36 Mo. 182, affirmed.—*Stucker v. Duncan*, 160.
4. *Confirmations.*—A confirmation of a lot by the Board of Commissioners in 1811, is a better title than a confirmation by the act of Congress of June 13, 1812, § 1, by virtue of inhabitation, cultivation and possession prior to December 20, 1803, as all prior confirmations were expressly excepted by said act of June 13, 1812.—*Le Beau v. Gaven et al.*, 556.

LIMITATIONS.

1. *Justices' Courts—Judgments.*—Judgments rendered in a justice's court are not barred by the statute of limitations. (R. C. 1855, p. 1053, § 16.)—*Humphreys v. Lundy*, 320.
2. *Adverse Possession—Color of Title.*—A party entering into possession of land without color of title, can only prescribe for the land in his actual occupancy; if he claim under a tax deed, his possession will be under color of title only from the date of the deed.—*De Graw v. Taylor*, 310.
3. *Disabilities.*—The disability of coverture cannot be tacked upon that of infancy so as to make one continuing disability. Where two or more disabilities exist together at the time the cause of action accrues, the statute of limitations will not begin to run until the last one is removed; but where one exists when the cause of action accrues, the statute will begin to run when that expires, notwithstanding others arise in succession afterward.—*Billon and wife v. Larimore et al.*, 375.
4. *Adverse Possession.*—A party entering into possession of land under claim of title, and exercising the usual acts of ownership over the whole tract described in the deeds under which he claims, for the period prescribed by the statute, thereby defeats the superior title by virtue of his adverse possession.—*City of Carondelet v. Simon et al.*, 408.
5. *Payment.*—An allowance by a probate court of a demand against the estate of one of the makers of a promissory note which had become barred by the statute of limitations, and payments made upon such allowance by the administrator of the deceased maker will not deprive the other joint makers of such note of their defence of the bar of the statute.—*Smith's Adm'r v. Irwin et al.*, 169.

M

MECHANICS' LIENS.

1. *Time.*—A sub-contractor's notice of lien given on the 15th February, and a lien filed on the 25th February, is given ten days before the filing of the lien, as required by the statute. The first day must be excluded, and the last included, in computing time within which an act is to be done—R. C. 1855, p. 1027, § 22.—*Hahn et als. v. Dierkes et al.*, 574.
2. *Practice.*—A party seeking to enforce a mechanic's lien upon a building, must show that he furnished the materials for the building under a contract either with the owner of, or the contractor for, the building. (*Hause v. Thompson*, 36 Mo. 450.)—*Hause v. Carroll*, 578.
3. *St. Louis County.*—The special act relating to mechanics' liens in St. Louis county (Sess. Acts 1857, p. 671) is not in conflict with, and does not repeal, the provisions of the 10th section of the general statute upon the same subject (R. C. 1855, p. 1068), and the provisions of that section are applicable to liens in said county.—*Deters v. Renick*, 597.

MORTGAGES.

1. *Trust*—A. conveyed real and other property to B. and other creditors, to secure debts and liabilities, upon condition that if he paid the debts the deed should be void; but if he did not pay the same, then that B. should have power to sell the property at auction, and convey the same, upon such terms as a majority of the grantees might agree upon. The deed did not provide how the proceeds of sale should be disposed of. *Held*, that the deed must be treated as a mortgage, with a power of sale in B., and that the proceeds of sale must be distributed upon the trusts implied in the deed according to the equities of the parties, under the control of a court of equity. *Held also*, that B. had such an interest and title in the property, that, upon a seizure and levy upon the personal property by the sheriff upon an execution against A. in favor of an unsecured creditor, he might make claim for the same, and might sue upon the bond given by the execution creditor, and recover not only for his own interest but also for that of his co-grantees. *Held further*, that upon default of payment, in accordance with the terms of the deed, he might take and hold possession for himself and his co-mortgagors.—*Steele et use of Milroy et al. v. Farber et al.*, 71.
2. *Emblements.*—Where the mortgagee enters upon the land and harvests the crops, thus converting them into personality, he takes them as profits of the estate, to be accounted for to the mortgagor in the settlement of the debt. —*Id.*
3. *Securities.*—A surety may give to his co sureties a mortgage to secure them, against his liability for contribution.—*Id.*
4. *Equity—Mistake—Parties.*—In a bill in equity, brought by the purchaser of land sold under a power given by a mortgage, to correct a mistake in the mortgage deed, the mortgagee is a necessary party.—*Haley v. Bagley*, 363.
5. *Vendors and Purchasers.*—A purchaser buying at a sale made by virtue of a power contained in a mortgage, buys at his peril.—*Id.*

N

NUISANCE.

See EQUITY, 3.

O

OFFICERS.

See CONSTITUTION, 8. GENERAL ASSEMBLY, 1. REVENUE, 4.

Revenue—Action.—The securities upon the official bond of the sheriff are liable to an action for the wrongful act of the sheriff as collector of revenue in levying upon property to enforce the payment of taxes illegally assessed upon property not subject to taxation. (See Hann. & St Jo. R.R. Co. v. Shacklett, 30 Mo. 550.) If the property be not subject to taxation, the collector is a trespasser if he levy the tax, in the same manner as an officer would be in enforcing the process of a court having no jurisdiction of the subject matter.—State to use, &c., v. Shacklett et al., 280.

P

PARTNERSHIP.

1. **Agreement.**—Parties cannot by any agreement as between themselves avoid the consequences of acts which constitute them partners as between themselves or as to third parties.—Meyer v. Field et al., 434.
2. **Dissolution.**—After the dissolution of a partnership by mutual consent, one partner cannot bind the other by any new contracts in the name of the firm, nor can he transfer the title to any of the partnership securities. Either party may reduce the choses in action to possession, and use them for paying the liabilities of the firm. If, after the dissolution, one of the partners die, his administrator may reduce choses in action to possession, and apply the proceeds to payment of the debts of the firm.—Mut. Sav. Inst. v. Enslin, 453.
3. **Note.**—A note given in the firm name with consent of all the partners, for the debt of one of the partners, is a partnership debt, and the firm is liable to the holder as principal debtor, and such note can be renewed by any of the partners.—Tilford v. Ramsey, 563.

PARTITION.

See GUARDIAN AND WARD, 1.

PAYMENT.

See EVIDENCE, 7.

1. **Contract—Tender.**—To make a tender of payment of money valid, as a general rule, the money must be actually produced and proffered unless the creditor expressly or impliedly waive its production. The creditor may not only waive the production of the money, but the actual possession of it in hand by the debtor. Nor is the debtor bound to count out the money if he has it and offers it, when the creditor refuses to receive it. A tender puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs when sued for the debt.—Berthold et al. v. Reyburn et al., 586.
2. **Tender—Demand.**—A party making a tender of payment, must be always ready to pay the amount tendered. To avoid the plea of tender by a subsequent demand, the creditor must show a demand of the precise sum tendered. The demand must be made of the debtor personally.—*Id.*

POSSESSION.

See LIMITATIONS, 2, 4.

POSSESSION (*Continued*).

1. *Action — Strays.* — The possession of personal property which will authorize an action for its recovery must be a lawful possession. Where a party took up a stray, which he kept in his possession for a year without proceeding as a taker up of a stray animal under the statute R. C. 1855, p. 1506, he is to be treated as a trespasser *ab initio*, and cannot recover possession of the animal from a party into whose possession the animal may have again come as a stray.—*Bayless v. Lefavre*, 119.

PRACTICE, CIVIL.

PARTIES.

1. *Equity—Mistake.* — In a bill in equity, brought by the purchaser of land sold under a power given by a mortgage, to correct a mistake in the mortgage deed, the mortgagee is a necessary party.—*Haley v. Bagley*, 363.

PLEADINGS.

2. *Negotiable Note.* — In a suit against the endorser, it is sufficient to set out the note according to its legal effect, and to allege that it was negotiable. It is not necessary to set out the note *in hec verba*.—(See *Jaccard v. Anderson*, 32 Mo. 188; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt*, 35 Mo. 461.)—*Bateson v. Clark et al.*, 31.
3. *Contract.* — An answer to a petition setting forth a contract and stating the particulars in which defendant failed to keep it, averring that the defendant had kept its terms and performed its conditions, although informal in not specifically denying the several allegations of the petition, presents issues to be tried, and does not admit the breaches alleged. Exceptions to such answer should be made before trial.—*Loher v. Cool et al.*, 85.
4. *Written Instrument.* — Where suit is brought upon a written instrument which is not alleged to be lost or mislaid, if it be not filed with the petition, the defendant may, after answer, move to dismiss the suit (R. C. 1855, p. 1240-1, §§ 59-60).—*Rothwell v. Morgan*. 107.
5. *Alien Enemy—Rebellion.* — A defendant in a suit brought or prosecuted by citizens residing in the States affected by the act of Congress of July 17, 1862, p. 590, “to suppress insurrection,” &c., to avail himself as a defence of the disability created by that act, must allege the facts in his pleadings.—*Dobbins et al. v. Hyde et al.*, 114.
6. *Answer.* — An answer may contain several different defences, but they must be consistent with each other, and must be separately stated. The defendant cannot in his answer deny, and then confess and avoid the cause of action.—*Adams' Adm'r v. Trigg*, 141.
7. *Attorneys—Demand.* — Before an attorney can be sued for moneys collected by him for his client, there must be a demand of payment, or a failure to remit, after a reasonable time, in accordance with instructions. If the petition fail to allege such demand, it will be defective on motion in arrest of judgment.—*Beardslee et al. v. Boyd et al.*, 180.
8. *Demurrer.* — An instrument of writing sued upon, and filed with the petition, constitutes no part of the pleading, and cannot be considered in determining the sufficiency of the pleadings.—*Baker v. Berry et al.*, 306.

PRACTICE, CIVIL (*Continued*).

9. *Variance—Judgment.*—A party cannot declare upon one cause of action, and recover judgment upon another and a different cause.—Harris v. Hann. & St. Jo. R.R. Co., 307.
10. *Slander.*—When the slanderous words used do not of themselves impute to the plaintiff the commission of a crime or offence involving moral turpitude, or some infamous punishment, the petition must contain an averment of the extrinsic matter necessary to show that the words are actionable. The words "he is a bushwhacker" are not actionable *per se*. Where the ground of complaint is that the plaintiff has been injured in his character, reputation, or business, the action cannot be maintained without an averment that the words were spoken of the plaintiff in reference thereto, and the words become actionable by reason of some special damage which must be averred and proved as laid.—Curry v. Collins, 324.
11. *Election—Voters.*—A petition in a suit against the judges of an election precinct for wrongfully refusing the plaintiff's vote, must set out the facts which give the plaintiff a cause of action, and show how he was entitled to vote, by stating the qualifications which gave him the right.—Curry v. Cabliss et al., 330.
12. *Petition—Relief—Demurrer.*—A petition is not subject to demurrer, because it asks for a judgment not warranted by the averments. The court may grant any relief consistent with the case made by the evidence and embraced within the issues.—Easley v. Prewitt et al., 361.
13. *Equity.*—It is improper to state matters of equity in the body of a count at law.—Billon & wife v. Larimore et al., 375.
14. *Equity.*—The distinction between law and equity still exists in our practice, and parties seeking equitable relief must set forth the facts in their pleadings in such a manner as to entitle them to the equitable relief prayed. Where matters of equitable jurisdiction are mixed and blended with matters of legal cognizance in the same count, the defect may be taken advantage of by demurrer, or by motion in arrest. Pleadings should be drawn with reference to these distinctions, though in the form prescribed by the statute.—Meyer v. Field et al., 434.
15. *Counter-claim.*—An answer of defendant, setting up an account of payments made by defendant to plaintiff, &c., is not a counter-claim, and is not confessed by the plaintiff's failing to file a replication; it is a plea of payment in bar of the action.—Holzbauer et al. v. Heine et al., 443.
16. *Evidence.*—No evidence is required of facts admitted by the pleadings.—Vallé v. North Missouri R.R. Co., 445.
17. *Mechanic's Lien.*—Where the petition upon a mechanic's lien alleged that ten days' notice of lien had been given, and the answer did not specifically deny the averment as to time, the allegation as to time must be taken as admitted.—Gorman v. Dierkes, 576.
18. *Contract.*—A party suing upon a contract for a stipulated consideration for services rendered, and averring performance, must show a reason for abandoning the contract price and seeking a recovery upon the *quantum meruit*.—Stoddard v. Murdock, 580.
19. *Note.*—A petition upon a note by an endorsee must allege the endorsements by which the plaintiff claims title. The note and its endorsements

PRACTICE, CIVIL (*Continued*).

are no part of the petition, and cannot be made such by reference thereto.—*Dyer v. Krayer*, 603.

TRIALS, &c.

20. *Evidence—Exceptions.*—Evidence should be admitted or rejected when offered, and the bill of exceptions should show that the objections were made when the evidence was offered, with the specific reasons therefor.—*Hann. & St. Jo. R.R. Co. v. Moore*, 338.
21. *Evidence.*—The order in which evidence shall be introduced and admitted upon the trial rests in the sound discretion of the court.—*Weston v. Clark*, 568.
22. *Jury—Constitution.*—In trials at common law in courts of record, the parties are entitled to a jury of twelve men as a matter of constitutional right, and any consent to waive this right must be entered of record. If such consent do not appear of record, the party may avail himself of the objection by motion in arrest of judgment.—*Brown v. Hann. & St. Jo. R.R. Co.*, 298.
23. *Action for Personal Property.*—It is no bar to the plaintiff's right of action to recover possession of personal property delivered to him upon giving bond, &c., and damages for the detention thereof, that the plaintiff has sold and transferred the property since it was delivered to him under the process of the court.—*Donohoe v. McAleer*, 312.

See EVIDENCE.

24. *Assignment.*—A plaintiff suing as assignee of an account, must prove the fact of assignment.—*Bersch, Assignee, v. Sander*, 104.
25. *Instructions.*—Where all the facts in evidence do not prove, nor tend to prove, the issue, it is the duty of the court so to instruct the jury as a matter of law.—*Jaccard et als. v. Anderson*, 91.
26. *Instructions—Jury.*—It is the duty of the judge to give the jury proper instructions as to the law applicable to the facts of the case; and it is not proper to allow the jury to take with them law books from which they may determine the law for themselves.—*Harrison v. Hance*, 185.
27. *Instructions.*—Instructions should not be so framed, nor given and refused, as to exclude from the jury the consideration of the points which are fairly raised by the evidence.—*Sawyer et al. v. Hann. & St. Jo. R.R. Co.*, 240.
28. *Instructions.*—Where, at the close of the plaintiff's case, there is no evidence proving the defendant's liability, the defendant has the right to ask the court to instruct the jury to find for the defendant. (Clark's Adm'x v. Hann. & St. Jo. R.R. Co., 36 Mo. 202, No. 4.)—*Smith v. Hann. & St. Jo. R.R. Co.*, 287.
29. *Venue.*—Judgment reversed because the court refused a change of venue, the circuit judge having been of counsel.—*Bailey v. Kimbrough*, 182.

NEW TRIALS.

30. *Newly Discovered Evidence.*—A party applying for a new trial, upon the grounds of newly discovered evidence, or of surprise by the evidence given by his own witnesses, must show that he has used due diligence or care to direct the attention of the witnesses to the particular point of their testimony.—*Howell's Exec'r v. Howell*, 124.

PRACTICE, CIVIL (*Continued*).

31. *Jury—Misbehavior.*—A traverse juror is not a competent witness to prove misbehavior in the jury. For a jury to make up the amount of the verdict by each juror naming a certain sum and then dividing the aggregate of the sums specified by the number of the jury, is an improper mode of making up the verdict, and is misbehavior on the part of the jury.—Sawyer et al. v. Han. & St. Jo. R.R. Co., 240.
32. *Injunction—Equity.*—A party who has failed to make his defence to a suit at law, and seeking the interposition of a court of equity, must show some substantial ground of relief which will bring the case under some head of equitable jurisdiction; such as fraud of the opposite party, uncontrollable accident, or mistake, unmixed with negligence or fault on his part. (Matson v. Field, 10 Mo. 100.)—Reed's Adm'r et al. v. Hansard, 199.
33. *Judgment.*—Where the defendant goes to trial without having filed an answer, and the damages are assessed without the previous entry of an interlocutory judgment, he will be considered as having waived the irregularity.—McClurg et als. v. Hurst, 144.
34. *Judgment—Process.*—Where process has been served upon a defendant, and judgment by default entered, the court cannot at a subsequent term, upon the mere suggestion of defendant, set aside the judgment upon the ground of defective service of process.—Bank of the State of Mo. v. Bray et al., 194.

See JUDGMENTS.

SUPREME COURT.

35. *Damages.*—Judgment affirmed, with ten per cent. damages, upon failure to file transcript of record and prosecute appeal.—Jasper et als. v. Miller et al., 124.
36. *Judgment.*—Judgment affirmed upon failure to file brief of points and authorities.—Reidey and wife v. Newell, 128.
37. *Excessive Damages—Verdict.*—Verdict set aside for excessive damages.—Sawyer et al. v. Hann. & St. Jo. R.R. Co., 240.
38. *Error and Exception.*—Distinction between error appearing of record and error appearing by exceptions.—Bateson v. Clark et als., 31.
39. *Appeal—Records.*—An appeal may be taken from the judgment of the Circuit Court rendered upon a citation issued by virtue of R. C. 1855, p. 1311, § 8, the same being a final judgment in a civil case.—Price v. Adamson, 145.
40. *New Trial.*—The Supreme Court will not reverse a judgment because the verdict is against the weight of evidence; but when there is no evidence, or the verdict is wholly unsupported by evidence, it will interfere and grant a new trial.—State v. Burnside, 343.
41. *Bill of Exceptions.*—Case stricken from the docket, the bill of exceptions not appearing from the transcript to have been signed by the judge, nor any appeal or writ of error taken.—Shotwell v. State, 359.
42. *New Trial.*—Judgment set aside because there was no evidence to authorize the verdict.—Nelson v. Boland, 432.
43. *Arbitrators—Awards.*—It is too late to urge in the Supreme Court, as an objection to an award, that the arbitrators were not sworn; the objection

PRACTICE, CIVIL (*Continued*).

- should have been made in the court below.—*Vallé v. North Missouri R.R. Co.*, 445.
44. *Exception.*—A party cannot present in the Supreme Court a matter of exception not presented in the court below.—*Hause v. Carroll*, 578.
45. *Judgment.*—Judgment affirmed under the peculiar circumstances.—*Plogstart v. Rothenbacher*, 452.

PRACTICE, CRIMINAL.

1. *Receiving Stolen Goods.*—In an indictment charging the defendant with receiving stolen goods with a guilty knowledge, it is not necessary that the name of the person who stole the goods should be stated.—*State v. Smith*, 58.
2. *Receiving Stolen Goods.*—Where a defendant is charged with having received stolen goods jointly with others, he may be convicted if the evidence show that himself separately received the property.—*Id.*
3. *Malicious Trespass—Evidence.*—Upon the trial of an indictment for unlawfully and maliciously taking down and removing a house, evidence that the defendant removed the house at the request of one who occupied and had apparent control of the premises is admissible to rebut the malicious intent. (R. C. 1855, p. 584.)—*State v. Underwood*, 225.
4. *Malicious Trespass.*—Although the defendant may have taken down and moved a dwelling-house without authority, a malicious intent must be proven, and is not to be presumed from the want of authority.—*Id.*
5. *Indictment.*—(R. C. 1855, p. 567, § 39.) Indictment charging defendant with feloniously assaulting another with a deadly weapon, and feloniously wounding, &c., is good.—*State v. Ray*, 365.
6. *Indictment—Merchant.*—An indictment which charges the defendant with unlawfully dealing, as a merchant, at his place, &c., without having a license, &c., by selling, &c., although informal, is good upon motion to quash, as the defect does not affect the substantial rights of the defendant. (State v. Cox, 32 Mo. 566.)—*State v. Willis*, 192.
7. *Evidence—Larceny.*—The possession of stolen property recently after its loss, is presumptive evidence of guilty possession, and if unexplained by attending circumstances, or the character of the possessor or otherwise, is taken as conclusive.—*State v. Gray*, 463.
8. *Jurors.*—Jurors must be impartial and wholly unprejudiced. Where a juror upon his *voir dire* has sworn that he had never formed or expressed an opinion as to the guilt or innocence of the prisoner, and after verdict of guilty, the defendant moved for a new trial, for the reason that the juror had before the trial declared that he believed the prisoner to be guilty, which fact the defendant only learned after verdict, and filing affidavit of respectable witnesses testifying to such expression of opinion on the part of the juror, the court should set aside the verdict and grant a new trial.—*State v. Burnside*, 343.
9. *Indictment.*—An indictment which charges an offence in the language of the statute creating it, is good. An indictment charging a party with administering medicine to a pregnant woman to procure an abortion or miscarriage, need not specify the kind, quality, or quantity of the medicine.—*State v. Van Houten*, 357.

PRACTICE, CRIMINAL (*Continued*).

10. *Demurrer*.—A demurrer, or motion to quash an indictment, must specify particularly the grounds of objection.—*Id.*
11. *Demurrer*.—A demurrer, or motion to quash an indictment, must specify the grounds of objection. (R. C. 1855, p. 1176, § 24.)—State v. Webb, 366.
12. *Crimes—Military*.—A soldier in the army of the United States may be indicted for robbery, and prosecuted in the courts of the State of Missouri.—State v. Rogers, 367.
13. *Indictment*.—It is not necessary that the name of the prosecuting witness should be endorsed upon an indictment for felony.—*Id.*
14. *Writ*.—A clerical error in the date of a writ of *capias* issued, or in the return of service, is no ground for quashing an indictment.—*Id.*
15. *License—Indictment*.—An indictment, under the 4th section of the act, approved March 28, 1861, to prevent the adulteration of spirituous liquors in this State, which charges the defendant with unlawfully selling spirituous liquors, &c., without first having given bond, as required by the statute, is sufficient; the indictment need not negative the exceptions contained in § 6 of the act. (Acts 1860-61, p. 92.)—State v. Crowley, 369.
16. *Sunday*.—From 12 o'clock on Saturday night until 12 o'clock on Sunday night, no court can transact any business except to receive a verdict or discharge a jury. (R. C. 1855, p. 542, § 64.) The civil day Sunday is *dies non juridicus*.—State v. Green, 466.
17. *Counts*.—It is within the discretion of the court to compel the prosecutor to elect upon which of several counts he will submit the cause to the jury.—State v. Gray, 463.
18. *Receiving Stolen Goods—Evidence*.—Upon an indictment for receiving stolen goods, knowing them to have been stolen, the State must prove that the property was stolen and that the defendant received the property knowing it to have been stolen; and all the acts which go to prove the fact of the stealing are properly admissible in evidence as part of the *res gestae*.—State v. Smith, 58.

PRINCIPAL AND AGENT.

Mortgage—Vendors and Purchasers.—A purchaser buying at a sale made by virtue of a power contained in a mortgage, buys at his peril.—Haley v. Bagley, 363.

R

REVENUE.

See CORPORATIONS, MUNICIPAL, 1, 2, 4.

1. *Corporations—Railroads*.—The lands granted by the State to the Hannibal and St. Joseph R. R. Co., by the act of Sept. 20, 1852, are not taxable for State and county purposes under the general revenue law. (Laws 1863-4, p. 65.) The property of the company is represented by its shares of stock, and there cannot be any other property over and above the stock held by the stockholders. (See Hann. & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550.)—State v. Hann. & St. Jo. R.R. Co., 265.
2. *Constitution—Officers*.—The sheriff is, by virtue of his office as sheriff, collector of the State and county taxes; the two offices are one and inseparable.

REVENUE (*Continued*).

The ordinance of the Convention, passed March 17, 1865, vacating the offices of sheriffs, &c., on May 1, 1865, deprived the sheriffs of all authority as collectors of the revenue. The offices were vacated altogether.—Price v. Adamson, 145.

3. *Union Military Fund*.—A collector who has overpaid the amount due the Union Military fund, cannot require the Auditor to issue a warrant for his reimbursement payable out of any money in the State treasury. By law all warrants must be drawn payable out of a specific fund. (R. C. 1855, p. 1540, § 84.)—State ex rel. Long v. Auditor, 87.
4. *Officer—Action*.—The securities upon the official bond of the sheriff are liable to an action for the wrongful act of the sheriff as collector of revenue in levying upon property to enforce the payment of taxes illegally assessed upon property not subject to taxation. (See Hann. & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550.) If the property be not subject to taxation, the collector is a trespasser if he levy the tax, in the same manner as an officer would be in enforcing the process of a court having no jurisdiction of the subject matter.—State to use, &c., v. Shacklett et al., 280.
5. *Stamps—Justices' Courts*.—The act of Congress does not require that a stamp shall be affixed to the certificate of a justice of the peace certifying an appeal to the Circuit Court. The appeal is not an original process under our statutes.—Norris v. Hann. & St. Jo. R.R. Co., 286.
6. *Lands—Conveyances*.—Under the Revenue Act of November 23, 1857, § 33, the deeds executed by the Register are *prima facie* evidence of title in the purchaser only when duly executed and recorded. A deed is not duly executed unless it be proved or acknowledged in the manner provided by the “Act relating to conveyances”—R. C. 1855, p. 364. Without being proved or acknowledged, the deeds cannot be recorded.—Stierlein v. Daley et al., 483.
7. *City of St. Louis—Conveyances*.—A tax deed, made upon a sale of lands by the City of St. Louis for unpaid taxes, must show a strict compliance with the statute. (Acts 1857, p. 99, § 43.) All such statutes, authorizing proceedings which are to have the effect of divesting a citizen of his title to real estate, must be strictly construed and strictly pursued.—*Id.*
8. *Union Military Fund*.—When there are funds in the hands of the Treasurer for the redemption of Union Military bonds, and the Auditor has knowledge of that fact, it is the duty of the Auditor, upon bonds being presented, to calculate the principal and interest due upon such bonds and to draw his warrant upon the Treasurer for their payment, although upon a previous day bonds may have been presented and a warrant refused for the reason that there were no funds in the treasury applicable to their payment. The demands presented on any day should be taken up by the Auditor in the order they are presented, but a previous presentment on a day when there were no funds can have no effect to give any right of priority. (See State ex rel. Werkman v. Treasurer, 36 Mo. 49.)—Dyer v. Auditor, 157.

S

SALES.

See **BILLS OF EXCHANGE**, 6. **CONTRACTS**, 3, 6.

SECURITIES.

1. *Judgment*.—One of several securities against whom judgment has been recovered, cannot, upon paying the debt to the creditor, take an assignment of the judgment to himself and enforce payment thereof by execution against the property of his co-sureties.—McDaniel et al. v. Lee et al., 204.
2. *Mortgage*.—A surety may give to his co-sureties a mortgage to secure them against his liability for contribution.—Steele to use, &c., v. Farber et als., 71.
3. *Contribution*.—The makers of a promissory note who have signed the same as securities are liable to the holder for the full amount of the note. Secs. 7 & 8 of R. C. 1855, p. 1456, apply only to cases where one security is sued by his co-security.—Vaughn v. Haden et al., 178.

STRAYS.

See POSSESSION, 1.

SUNDAY.

See PRACTICE, CRIMINAL.

T

TENDER.

See PAYMENT.

U

USES AND TRUSTS.

See MORTGAGES, 1, 2. ASSIGNMENTS, 2.

1. *Equity—Trustee—Agent*.—A. being indebted to B. by note, as security for its payment transferred to B. a note of C.'s for a larger amount, secured by a deed of trust upon land, and the deed of trust itself. The note of C. not being paid, B. had the land sold by the trustee, and purchased at the trustee's sale. This land B. subsequently sold for an amount more than sufficient to pay the note of A. *Held*, that, in collecting the collateral note, B. was acting as the agent of A., and was subject to all rights and disabilities incident to that character, and could not, under the circumstances, speculate for his private gain, to the prejudice of his principal.—Boardman v. Florez, 559.
2. *Equity*.—A party seeking to enforce a trust, to be entitled to relief in equity must show that a trust in the property was created for his benefit either in the sale of the property, or in some subsequent transaction. Trusts are express or implied. An express trust is created whenever the legal estate is conveyed to one competent to take as trustee for the benefit of one capable of holding as a beneficiary. Implied trusts may be raised upon the supposed intention of the parties as shown by their actions. The former is created by the act of the parties, the latter by the act and construction of law.—Foster et als. v. Friede et als., 36.

V

VENDORS AND PURCHASERS.

1. *Equity*.—A purchaser of land with notice of the equities of a prior purchaser, takes the land subject to such equities.—Gibson v. Lair et al., 188.
2. *Mistake—Parties*.—In a bill in equity, brought by the purchaser of land

VENDORS AND PURCHASERS (*Continued*).

- sold under a power given by a mortgage, to correct a mistake in the mortgage deed, the mortgagee is a necessary party.—*Haley v. Bagley*, 363.
3. *Mortgage*.—A purchaser buying at a sale made by virtue of a power contained in a mortgage, buys at his peril.—*Id.*
4. *Satue of Frauds*.—A purchaser may insist upon the defence of the statute of frauds, although he confess the parol agreement. (R. C. 1855, p. 1238, § 47.) A part performance, by the vendee, of a parol contract for the sale of lands will not avail the vendor.—*Luckett v. Williamson*, 388.
5. *Title*.—A vendor may enforce a specific performance of a contract for the sale of lands, if he can show a good title at the time of trial or decree.—*Id.*

W

WITNESSES.

1. *Evidence*.—The assignor of a note or chose in action is not a competent witness as to any facts occurring prior to the assignment.—*Hendricks v. Ebbitt*, 24.
2. *Note*.—The endorser of a note is a competent witness to prove that the note was endorsed without any consideration paid or given, and merely for collection.—*Perry et al. v. Siter et als.*, 273.
3. *Competency*.—Where defendants jointly indicted are severally tried, the wife of the defendant not on trial is a competent witness for the co-defendant, except in cases of conspiracy and other joint offences.—*State v. Burnside*, 343.
4. *Assignor—Evidence*.—The assignor of a note is not a competent witness as to facts occurring anterior to the assignment, and his conversations with a witness in the absence of the plaintiff are merely heresay, and are inadmissible in evidence.—*Labadie's Exec'r v. Chouteau et als.*, 413.
5. *Judgment Debtor*.—The judgment debtor is a competent witness for the plaintiff in an execution in the proceedings against a garnishee upon execution. He is not a party to the immediate record, neither is he an assignor, within the meaning of the statute.—*Scales et al. v. Southern Hotel Company*, 520.